WestlawNext

RELATED TOPICS

Prisoners and Inmates

Orders of State Board of Prison Directors

In re B.F.
Supreme Court of Vermont. June 14, 1991 157 Vt. 67 595 A.2d 280 *(Approx. 4 pages)*

157 Vt. 67
Supreme Court of Vermont.

In re B.F., Juvenile.
In re S.A., Juvenile.

Department of Social and Rehabilitation Services appealed from orders of the District Court, Chittenden Circuit, George T. Costes and Michael S. Kupersmith, JJ., restraining it from transporting juveniles in restraints. The Supreme Court, Allen, C.J., held that juverile court exceeded its authority in restraining Department from transporting juveniles in restraints.

Vacated.

West Headnotes (1)

Change View

1 **Infants** Transfer
Juvenile court exceeded its authority in restraining Department of Social and Rehabilitation Services from transporting juveniles in restraints. 33 V.S.A. § 5534.

3 Cases that cite this headnote

Attorneys and Law Firms

***280** *68 Jeffrey L. Amestoy, Atty. Gen., Montpelier, and Alexandra N. Thayer, Asst. Atty. Gen., Waterbury, for plaintiff-appellant.

Walter M. Morris, Jr., Defender General, and Robert Sheil, Juvenile Defender, Montpelier, for defendants-appellees.

Before *67 ALLEN, C.J., and PECK and DOOLEY, JJ., and BARNEY, C.J. (Ret.), Specially Assigned.

Opinion

ALLEN, Chief Justice.

The Department of Social and Rehabilitation Services (SRS) appeals from two juvenile court orders restraining it from transporting juveniles in restraints. SRS claims that the juvenile courts exceeded their authority in promulgating the orders. We agree and vacate the orders.

***281** Based on a finding of delinquency, legal custody of S.A. was transferred to SRS in 1986. S.A. came before the juvenile court in June 1988 for review of the disposition order. During the course of this review action, which was continued several times, S.A. was placed at the Woodside Juvenile Rehabilitation Facility. A youth placed at Woodside is transported to and from court appearances in restraints. The juvenile court, upon resuming *69 its dispositional review on November 2, 1988, provided in its review order that SRS not transport S.A. with either leg-irons or hand-cuffs. SRS appeals from this order.

B.F., originally in SRS custody as a child in need of care or supervision, was found to be delinquent and was continued in SRS custody pending disposition. During the course of the disposition hearings, B.F. was placed at Woodside and was transported to and from the courthouse in restraints. The juvenile court heard argument and took testimony regarding

the appropriateness and necessity of this manner of transport. It subsequently issued a protective order pursuant to 33 V.S.A. § 5534 prohibiting SRS from using "leg irons, shackles or similar restraining devices when transporting B.F. to and from court." The court, conducting the inquiry required by § 5534(2), found that the practice of using restraints was "most harmful to the child's self-esteem. The child himself testified that he was humiliated by walking on the street and through the corridors of the public court building in chains." Further, the court found that "[g]iven B.F.'s unfortunate history, and his apparently low self-esteem, the Department of Social and Rehabilitation Services' continuing use of chains and restraints on this child is not only very harmful but will also tend to defeat the execution of any therapeutic disposition to be made." SRS appeals from this protective order.

Addressing the dispositional review order concerning S.A. first, dictating the manner in which SRS was to transport S.A. was clearly beyond the juvenile court's authority. The juvenile court is a court of "special and very limited statutory powers." ***70** *In re M.C.P.*, 153 Vt. 275, 302, 571 A.2d 627, 642 (1989); *In re K.H.*, 154 Vt. 540, 542, 580 A.2d 48, 49 (1990). In establishing juvenile procedures, the Legislature sought to achieve a balance between the authority of the juvenile court and the authority of the legal custodian. *In re G.F.*, 142 Vt. 273, 280, 455 A.2d 805, 809 (1982); see also *In re J.S.*, 153 Vt. 365, 371, 571 A.2d 658, 662 (1989) (statute governing juvenile procedures "allocates power between the legal custodian and the juvenile court"). This balance dictated our conclusion in *G.F.* that SRS, as legal custodian of a child, has the authority to determine where that child shall live. 142 Vt. at 281, 455 A.2d at 809. While the juvenile court retains the limited authority to accept or reject a placement recommendation of the legal custodian, it cannot include in its disposition order a specific placement. "[T]he juvenile court has no authority to dictate where and with whom a juvenile should live...." *Id.*; see 33 V.S.A. § 5502(a)(10) (giving person with legal custody extensive authority over the minor). It is likewise within SRS's authority, as legal custodian of a child, to determine the most appropriate manner of transporting that child. Nothing in the statutory scheme or our case law persuades us that in the balance struck between the juvenile court and the legal custodian, the determination on how to transport a child lies within the authority of the juvenile court. Accordingly, that portion of the dispositional review order dictating the manner of transport is vacated.

***282** The order concerning B.F. was not part of a dispositional review order, rather it was a protective order issued pursuant to § 5534. Yet the balance struck between the juvenile court and the legal custodian is not meant to be upset by this protective order provision. It is plain from our decisions that the juvenile court, lacking authority to order specific placement of a child, cannot achieve the same end under the guise of a protective order. In *In re B.L.*, 149 Vt. 375, 543 A.2d 265 (1988), a child filed a petition for a protective order to block SRS's intended placement of him. The juvenile court granted the protective order on an interim basis and required SRS to seek modification of the original disposition order, which it subsequently granted. On the child's appeal, this Court upheld SRS's placement yet vacated the juvenile court's protective order and its requirement that SRS seek modification. SRS's placement was upheld because SRS, as legal custodian, had the authority to make this ***71** placement without judicial approval. *Id.* at 376, 543 A.2d at 266. The juvenile court's orders concomitantly were vacated because it lacked authority to issue them. *Id.* at 376–77, 543 A.2d at 266. This holding was reaffirmed in *J.S.*, 153 Vt. at 371, 571 A.2d at 662 ("juvenile court lacked the authority to require SRS to obtain court approval for the modification of a disposition order to effectuate a change in the placement of a child within its custody"); see also *In re A.K.*, 153 Vt. 462, 463, 571 A.2d 75, 76 (1990) (juvenile court appropriately denied parents' protective order petition "on the grounds that it had no authority to interfere with SRS's lawful placement of a child in its custody").

In line with these authorities, the order in B.F. is invalid if viewed as an attempted exercise of authority, through the guise of a protective order, over the manner in which SRS transports juveniles. Further, if the order is viewed as an attempt to prohibit conduct that is "detrimental or harmful to the child, and will tend to defeat the execution of the order of disposition made or to be made," § 5534(2), it is unreasonable. As is clear from the text of this provision, a finding that conduct is detrimental or harmful to a child is not enough to warrant a protective order. The juvenile court has not been granted the power to intrude into SRS's custody whenever it perceives harmful or detrimental conduct. Rather, its power is limited to prohibiting such conduct that tends to defeat execution of the court's disposition order. SRS's manner of transport cannot reasonably be found to tend to defeat the execution of a disposition order. Accordingly, the protective order is vacated as an abuse of discretion. *J.S.*, 153 Vt. at 371, 571 A.2d at 661.

We recognize that the juvenile court is invested with the same authority over courthouse premises that other courts possess. "[T]he courtroom and courthouse premises are subject

to the control of the court." *Sheppard v. Maxwell,* 384 U.S. 333, 358, 86 S.Ct. 1507, 1520, 16 L.Ed.2d 600 (1966); see *State v. Robillard,* 146 Vt. 623, 630, 508 A.2d 709, 714 (1986) (trial court has power, within constitutional limits, to close courtroom to the public); *State v. Ahearn,* 137 Vt. 253, 269–70, 403 A.2d 696, 706–07 (1979) (trial court has power to restrain defendant). The juvenile court has the authority to proscribe the use of restraints on the juveniles while they are on courthouse premises. We vacate the current orders because they reach beyond this.

Vacated.

Parallel Citations

595 A.2d 280

Footnotes

* 33 V.S.A. § 5534 provides:

> On petition of a party or on the court's own motion, the court may make an order restraining or otherwise controlling the conduct of a person if:
>
> (1) An order of disposition of a delinquent child or a child in need of care or supervision has been or is about to be made in a proceeding under this chapter; and
>
> (2) The court finds that such conduct is or may be detrimental or harmful to the child, and will tend to defeat the execution of the order of disposition made or to be made; and
>
> (3) Notice of the petition or motion and the grounds therefor and an opportunity to be heard thereon have been given to the person against whom the order is directed.

End of Document © 2014 Thomson Reuters. No claim to original U.S. Government Works.

WestlawNext

RELATED TOPICS

Infants

Dependent, Neglected, and Delinquent Children

Beginning of Juvenile Delinquency Adjudication

In re Staley
Supreme Court of Illinois. June 1, 1977 67 Ill.2d 33 7 Ill.Dec. 85 364 N.E.2d 72 *(Approx. 5 pages)*

67 Ill.2d 33
Supreme Court of Illinois.

In re Derwin STALEY, a Minor.
The PEOPLE of the State
of Illinois, Appellant.

Derwin STALEY, Appellee.

No. 48847. June 1, 1977.

Juvenile was adjudicated delinquent by the Circuit Court, La Salle County, John David Zwanzig, J., and he appealed. The Appellate Court, 40 Ill.App.3d 528, 352 N.E.2d 3, reversed and People appealed. The Supreme Court, Ward, C. J., held that it was error to require juvenile to appear at adjudicatory hearing while handcuffed.

Affirmed.

Underwood, J., dissented and filed an opinion in which Ryan, J., concurred.

Ryan, J., dissented and filed an opinion.

West Headnotes (2)

Change View

1 **Criminal Law** Trial
Rule that an accused should not be subjected to physical restraint while in court unless the restraint is necessary to maintain order is just as applicable to trial by court as it is to trial by jury.

23 Cases that cite this headnote

2 **Infants** Course and conduct
In the absence of any showing that accused posed a threat of escape and in the absence of any showing that additional guards or deputies could not have been placed in the courtroom if court thought that they were necessary, it was improper to require juvenile to appear at adjudicatory hearing in handcuffs.

17 Cases that cite this headnote

Attorneys and Law Firms

*34 **72 ***85 William J. Scott, Atty. Gen., Springfield, and Frank X. Yackley, State's Atty., La Salle (James B. Zagel and Jayne A. Carr, Asst. Attys. Gen., and *35 James E. Hinterlong and Michael B. Weinstein, Ill. State's Attys. Assn., Ottawa, of counsel), for the People.

Robert Agostinelli and Mary Robinson, Deputy State Appellate Defenders, Ottawa, for appellee.

Opinion

WARD, Chief Justice.

In April of 1975, the circuit court of La Salle County found the defendant, Derwin Staley, a 15-year-old youth, to be a minor in need of supervision and placed him in the La Salle County Detention Home. On May 2, 1975, a resident of the home attacked and severely beat a teacher. The defendant, by blocking their path, prevented a counselor and the

superintendent of the home from coming to the teacher's assistance. The defendant was immediately taken before the La Salle County juvenile court in handcuffs. His attorney moved that the handcuffs be removed, stating that two deputies were present and that one could be placed in front of each door to prevent escape. A guard from the home, who accompanied the defendant, stated that it was up to the judge to decide whether the handcuffs should be removed. The assistant State's Attorney recommended to the court that the defendant remain handcuffed. The trial court followed the prosecutor's recommendation, stating that it did not want what was happening at the home to occur in the courtroom.

A petition alleging the defendant's delinquency was filed and on May 12, 1975, an adjudicatory hearing was held and the defendant was found delinquent. He had been brought into court for this hearing wearing handcuffs and his attorney again moved for their removal. The court denied the motion, saying there was "poor security" in the *36 courtroom and that it might order the handcuffs removed at the afternoon session if the defendant behaved properly. All of the evidence was presented at the morning session; at the afternoon session the trial court held that the defendant was delinquent and then proceeded to commit him to the Department of Corrections for diagnostic evaluation. The defendant did not make a request for removal of the handcuffs at the afternoon session. The appellate court reversed and remanded the cause for another adjudicatoryhearing, **73 ***86 holding that the trial court erred when it required the defendant to appear at the adjudicatory hearing wearing handcuffs. (40 Ill.App.3d 528, 352 N.E.2d 3.) We granted the State leave to appeal under Rule 315. 58 Ill.2d R. 315.

In People v. Boose (1977), 66 Ill.2d 261, 265-66, 5 Ill.Dec. 832, 834, 362 N.E.2d 303, 305, we said:

"It has been held that the shackling (which includes handcuffing, see ABA Standards, Trial by Jury sec. 4.1(c), Commentary 94 (1968)) of the accused should be avoided if possible because: (1) it tends to prejudice the jury against the accused; (2) it restricts his ability to assist his counsel during trial; and (3) it offends the dignity of the judicial process. (Kennedy v. Cardwell (6th Cir. 1973), 487 F.2d 101, 105-06; State v. Tolley (1976), 290 N.C. 349, 367, 226 S.E.2d 353, 367.) Most of the courts that have considered the question have held that an accused should never be placed in restraints in the presence of the jury 'unless there is a showing of a manifest need for such restraints.' (People v. Duran (1976), 16 Cal.3d 282, 290-91, 127 Cal.Rptr. 618, 623, 545 P.2d 1322, 1327; see Illinois v. Allen (1970), 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353; United States v. Theriault (5th Cir. 1976), 531 F.2d 281; Kennedy; Tolley.) The ABA Standards relating to jury trials provide:

*37 'Defendants * * * should not be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to maintain order.' ABA Standards, Trial by Jury sec. 4.1(c) (1968)."

1 The State points out that there was no trial by jury here. The possibility of prejudicing a jury, however, is not the only reason why courts should not allow the shackling of an accused in the absence of a strong necessity for doing so. The presumption of innocence is central to our administration of criminal justice. In the absence of exceptional circumstances, an accused has the right to stand trial "with the appearance, dignity, and self-respect of a free and innocent man." (Eaddy v. People (1946), 115 Colo. 488, 492, 174 P.2d 717, 719.) It jeopardizes the presumption's value and protection and demeans our justice for an accused without clear cause to be required to stand in a courtroom in manacles or other restraints while he is being judged. Also, as we observed in Boose, shackling restricts the ability of an accused to cooperate with his attorney and to assist in his defense. (66 Ill.2d 261, 265, 5 Ill.Dec. 832, 362 N.E.2d 303.) The reasons for forbidding shackling are not limited to trials by jury. Section 4.1(c) of the ABA Standards relating to trial by jury, which is cited above, while it does concern the conduct of jury trials, does not limit its disapproval of physical restraint of a defendant to such trials. The commentary to section 4.1 provides:

" * * * (T)he matter of custody and restraint of defendants and witnesses at trial is not of concern solely in those cases in which there is a jury. Obviously, a defendant should be able to consult effectively with counsel in all cases. Prison attire and unnecessary physical restraint are offensive even when there is no jury. * * *

(c) * * * Because the rule rests only in part upon the possibility of jury prejudice, it should not be limited to jury trials." ABA Standards, Trial by Jury sec. 4.1, Commentary 92-94 (1968).

We do not, of course, overlook that a trial judge has *38 the responsibility of insuring a

proper trial and that there may be circumstances which will justify the restraint of an accused. It was stated in Boose (66 Ill.2d 261, 266, 5 Ill.Dec. 832, 834, 362 N.E.2d 303, 305): "A defendant may be shackled when there is reason to believe that he may try to escape or that he may pose a threat to the safety of people in the courtroom or if it is necessary to maintain order during the trial. (Citations.)" In the absence of such a showing, however, which must be established clearly on the record (People v. Boose, 66 Ill.2d 261, 267, 5 Ill.Dec. 832, 362 N.E.2d 303), an accused cannot be **74 ***87 tried in shackles whether there is to be a bench trial or a trial by jury.

2 The State points to the trial court's concern over the "poor security" in the courtroom and argues that this was a sufficient justification for requiring the defendant to remain handcuffed during the adjudicatory hearing. The argument does not impress. There is nothing in the record to show that the defendant posed a threat of escape. While the record is not absolutely clear as to the status of the security in the courtroom, we consider that if guards or deputies were not present, they should have been summoned in order to resolve the security problem. Physical restraints should not be permitted unless there is a clear necessity for them.

For the reasons stated, the judgment of the appellate court is affirmed.

Judgment affirmed.

UNDERWOOD, Justice, dissenting:
I do not agree with the court's holding that the action of the trial judge constituted an abuse of the discretion vested in him.

The juvenile probation officer's April 7 report indicates defendant had been referred to that office by the Somonauk Police Department in March of that year. He had been an habitual runaway since the age of 10. On April 8 the court adjudged him a minor in need of supervision and placed him in the La Salle County Group *39 Home. He became, the May 8 supplemental report states, "a serious discipline problem" at the Group Home. The May 2 episode at the La Salle County Detention Home resulted, the report continues, in hospitalization of the teacher who had suffered a broken leg, arm and nose. Thereafter, defendant was transferred by the court to the Kankakee County Detention Home, a more secure facility than the La Salle County Home, pending the adjudicatory hearing. While the report and supplemental information are included in this record, the extent to which the judge was personally aware of its contents prior to the hearings is not entirely clear. It is not unfair to presume some recollection on his part, however, since defendant had been before the court several weeks earlier when he had been adjudged a minor in need of supervision. This, it seems to me, is relevant in considering whether permitting defendant to remain handcuffed constituted an abuse of the trial court's discretion.

As Mr. Justice Stengel emphasizes in his cogent dissenting opinion in the appellate court, trial judges are vested with discretion in determining whether the likelihood of escape or violent conduct by a defendant indicates the desirability of some restraint. (21 Am.Jur.2d Criminal Law sec. 240 (1965); Loux v. United States (9th Cir. 1968), 389 F.2d 911, 919-20, cert. denied (1968), 393 U.S. 867, 89 S.Ct. 151, 21 L.Ed.2d 135.) It is not necessary that the court wait until an attempt to escape or a dangerous act occurs in the courtroom. Loux, at 919-20.

The majority relies upon our opinion in Boose, which was a substantially different situation. There, instead of a simple pair of handcuffs, "(t)he defendant was brought to court wearing handcuffs, which were threaded through shackles attached to a restraining belt wrapped around his waist. His shoelaces had been removed." (People v. Boose (1977), 66 Ill.2d 261, 264, 5 Ill.Dec. 832, 833, 362 N.E.2d 303, 304.) There, instead of a judge, the defendant appeared before a jury, where the possibility of prejudice was certainly enhanced. The majority cites, as *40 authority for its holding, no case which did not involve a jury trial, including Eaddy v. People (1946), 115 Colo. 488, 492, 174 P.2d 717, 719. I note, too, that the partial sentence quoted from Eaddy in the majority opinion concludes with: ", except as the necessary safety and decorum of the court may otherwise require." (115 Colo. 488, 492, 174 P.2d 717, 719.) Also, it is noteworthy that in each of the cases, other than Boose and Duran, cited by the majority, the convictions were upheld, and in Duran multiple errors in addition to the shackling, contributed to the reversal.

The Boose opinion and the majority here have relied heavily upon the American Bar Association Standards, as is indicated by **75 ***88 the quotations in the majority opinion. Those standards, however, focus primarily upon the prejudicial effect upon a jury, and we have none here. The trial judge observed that there was "poor security" in the courtroom, which the majority suggests is preferably remedied by summoning additional guards. Implicit

in this suggestion is the view that calling more officers to guard the defendant somehow has a less prejudicial effect upon the judge than handcuffing the defendant. To me the exact opposite is likely. While I doubt that a judge will be prejudiced in either event, the argument that he will be more so if the prisoner appears before him in handcuffs than if the judge is told it will be necessary to summon additional guards before the prisoner is brought in is too sophisticated for me to accept.

Similarly, the argument that the handcuffs restrict defendant's ability to effectively communicate with his counsel is, in my judgment, simply not realistic. They may have done so in Boose where the cuffs were attached to a restraining belt, but I do not agree that effective assistance to counsel was restricted here in any significant way.

Lastly, the majority urges that the handcuffing jeopardizes the value of the presumption of innocence and demeans our system of justice. I am by no means certain *41 that significant loss actually occurs in either of those areas under the circumstances in this case, but, in any event, they are not the sole factors to be considered. The facts that defendant was an habitual runaway, that, while being held in a detention facility, he prevented help from reaching a teacher being severely beaten by another inmate, and that defendant might now try to escape in view of the prospect of additional confinement, were not irrelevant. Nor do we know the age, sex, condition or number of courtroom personnel present who might be able to assist in restraining defendant if an escape were attempted. The trial judge is ordinarily far better informed on such matters than we and better able to assess the security needs in his courtroom. We know from our review of the cases before us that individuals the age of defendant or younger engage in violent conduct, including homicides. While I agree that the trial judge's discretion to permit restraints should be exercised sparingly, I am not convinced that the trial judge's action here, where there was no jury involved, constituted an abuse of discretion requiring a new adjudicatory hearing.

I would accordingly reverse the appellate court and affirm the trial court.

RYAN, Justice, dissenting:
I concur in the dissent of Mr. Justice Underwood. In addition I wish to make some observations that are more in the nature of expressions of personal opinions than statements of legal precepts.

It would seem that when the hearing has been held before the court and not a jury a defendant should be required to demonstrate that he has in some manner suffered prejudice by being handcuffed during the trial. In this case it is not contended that the evidence did not support the court's finding that the defendant was delinquent. In fact, it is not urged that the evidence was close or evenly balanced. It appears to me to be a useless *42 obeisance to "the appearance, dignity, and self-respect of a free and innocent man," a needless expense and a waste of judicial time to remand this case for another delinquency hearing at which there is no contention the finding of the court would be or could be different.

Also, I am concerned about the after-the-fact determination by the majority that the defendant should not have been handcuffed. The trial judge is charged with the responsibility for the decorum of his courtroom and with the responsibility for the safety of every person in it. He must make a judgment, balancing the possibility of offending the dignity of the defendant who has been charged with participating in an act of violence against the possibility of death or injury to himself and others in his court. If he errs in striking this balance, in my opinion, it is better to offend the dignity **76 ***89 of the defendant than to suffer violence to erupt in the courtroom. Even at the risk of being reversed by a court of review, I would, if again a trial judge, adhere to this belief. It is the trial court and not this court that will be held accountable to the public for permitting acts of violence to occur in court. In such a sensitive area, the trial court should not be reversed short of a clear abuse of discretion.

For these reasons I do not believe the circuit court of La Salle County should have been reversed in the absence of a showing that the defendant was in some way prejudiced or that the trial court clearly abused its discretion. I therefore respectfully dissent.

Parallel Citations

67 Ill.2d 33, 364 N.E.2d 72

End of Document © 2014 Thomson Reuters. No claim to original U.S. Government Works.

Preferences | My Contacts | Offers | Getting Started | Help | Live Chat | Sign Off

THOMSON REUTERS

Westlaw Next. © 2014 Thomson Reuters Privacy Statement Accessibility Contact Us 1-800-REF-ATTY (1-800-733-2889) Improve WestlawNext

WestlawNext

RELATED TOPICS

Criminal Law
Evidence
Fair and Impartial Fact Finder
Trial
Substantive or Procedural Due Process Guarantees of Federal or State Constitution

Infants
Dependent, Neglected, and Delinquent Children
Evidence Established Juvenile Unauthorized Use of Motor Vehicle

State ex rel. Juvenile Dept. of Multnomah County v. Millican
Court of Appeals of Oregon. November 29, 1995 138 Or.App. 142 906 P.2d 857 *(Approx. 11 pages)*

In the Matter of Millican, Robert Shawn, a Minor Child.
STATE ex rel. JUVENILE DEPARTMENT OF MULTNOMAH COUNTY, Respondent,
v.
Robert MILLICAN, Appellant

9112–83948; CA A84749. Argued and Submitted Sept. 19, 1995. Decided Nov. 29, 1995.

Juvenile was adjudicated by the Circuit Court, Multnomah County, Dale R. Koch, J., to be within court's jurisdiction for committing act which, if committed by adult, would constitute third-degree sexual abuse. Juvenile appealed. The Court of Appeals, Haselton, J., held that: (1) evidence supported finding that juvenile had requisite intent, and (2) juvenile court's refusal to order juvenile's leg chains removed in court was harmless error.

Affirmed.

De Muniz, J., dissented and filed opinion.

West Headnotes (8)

Change View

1 **Infants** Trial or review de novo
Infants Presumptions, inferences, and burden of proof
On appeal of juvenile court's finding that juvenile is with court's jurisdiction, Court of Appeals reviews evidence de novo, giving due deference to credibility determinations made by juvenile court judge. ORS 19.125(3), 419A.200(5).

2 Cases that cite this headnote

2 **Infants** Sex offenses
Finding that juvenile had requisite intent to commit act which, had juvenile been adult, would have constituted third-degree sexual abuse, by grabbing buttocks of female staff member at group home, was supported by evidence of other contemporaneous interactions between juvenile and staff member that involved touching and suggestive comments by juvenile. ORS 163.305(6), 163.415(1).

3 **Constitutional Law** Custody and restraint
Criminal Law Discretion of court
Under Fifth Amendment and due process clause, trial judge has discretion to order shackling of defendant during criminal trial if there is evidence of immediate and serious risk of dangerous or disruptive behavior. U.S.C.A. Const.Amends. 5, 14.

2 Cases that cite this headnote

4 **Criminal Law** Evidentiary matters
Criminal Law Proceedings at trial in general
In exercising its discretion to order shackling of defendant during criminal trial, court must receive and evaluate relevant information and must make record allowing appellate review of its decision; although information need not be presented in formal adversary proceeding, conclusory statement alone by prosecutor or law enforcement officer is not sufficient.

2 Cases that cite this headnote

5 **Constitutional Law** Bill of Rights or Declaration of Rights
Constitutional Law Proceedings
Infants Course and conduct
Under Fourteenth Amendment and Bill of Rights, juvenile has same right as adult defendant to appear in court free from physical restraints. U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

6 **Constitutional Law** Proceedings
Infants Course and conduct
Juvenile court was required under due process clause/order to removal of juvenile's leg chains in court absent evidence that juvenile posed immediate and serious risk of dangerous or disruptive behavior. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

7 **Infants** Manner and conduct of proceedings in general
Court of Appeals considers whether juvenile court's failure to order juvenile's shackles removed in court is harmless beyond reasonable doubt.

1 Case that cites this headnote

8 **Infants** Manner and conduct of proceedings in general
Juvenile court's failure to grant juvenile's motion to order his leg chains removed in court was harmless error; there was no evidence that court's credibility determinations were impermissibly skewed, no indication that leg chains adversely affected juvenile's decision to testify, and no indication that juvenile's right to consult with counsel was impaired in any fashion.

Attorneys and Law Firms

***858** Kelly Michael Doyle, Portland, argued the cause and filed the brief for appellant.

David B. Thompson, Assistant Attorney General, argued the cause for respondent. With him on the brief was Theodore R. Kulongoski, Attorney General, and Virginia L. Linder, Solicitor General.

Before DEITS, P.J., and De MUNIZ and HASELTON, JJ.

Opinion

***144** HASELTON, Judge.

Child appeals from a judgment finding him to be within the court's jurisdiction for committing an act which, if committed by an adult, would constitute sexual abuse in the third degree. ORS 163.415.[1] We affirm.

The juvenile court's adjudication arose from an incident in which child, then a 16–year–old resident of a boys' group home, allegedly grabbed the buttocks of complainant, a female staff member. The court determined that the conduct subjected the complainant to non-consensual "sexual contact." ORS 163.415.

1 2 Child first contends that the state failed to prove beyond a reasonable doubt that he acted with the mental intent necessary to render the physical contact "sexual," within the meaning of ORS 163.415. We review the evidence *de novo,* ORS 419A.200(5); ORS 19.125(3), giving due deference to the credibility determinations made by the juvenile court judge. *State ex rel Juv. Dept. v. Beyea,* 126 Or.App. 215, 217–18, 867 P.2d 565 (1994); *State ex rel Juv. Dept. v. Cruz,* 111 Or.App. 216, 218, 826 P.2d 30 (1992).

ORS 163.305(6) defines "sexual contact" as

> "any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate ***859** parts of the actor *for the purpose of arousing or gratifying the sexual desire of either party.*" (Emphasis supplied.)

After reviewing all the evidence, including evidence of other contemporaneous interactions between child and complainant, that involved touching and suggestive comments by child, we conclude that the evidence established, beyond a reasonable doubt, that child acted with the requisite intent and, thus, that the contact was "sexual contact."

***145** Child next assigns error to the juvenile court's refusal to direct that he be unshackled during the delinquency hearing. Child contends, particularly, that his continued shackling violated due process and so interfered with his right to a fair trial that the adjudication must be reversed. [2]

The following colloquy occurred at the beginning of the proceeding:

> [Child's counsel]: "We're prepared to proceed Your Honor. There is one preliminary matter for the court and that relates to the fact that [child] was brought to Court this morning in leg chains.
>
> "That is the current procedure that the sheriff's officers use in transporting children from the detention center to the courthouse for various hearings. And while [being] short staff[ed] may well explain why that is necessary in a lot of circumstances, I strongly object, during the course of the trial, to having him appear and participate and testify while in chains.
>
> "I think it has a definite cooling effect in terms of his exercise of his constitutional rights. And, I would argue that it is an interference with his right to due process and a fair trial.
>
> * * * * * *
>
> "[The court]: Your objection is noted. I'd just note that this isn't a jury proceeding. It's a proceeding before the court. And I understand your concerns. But I can assure the—the child that whether or not he is in leg chains—or not won't affect the court's view of the evidence presented here. I appreciate the objection, for the record, though.
>
> "[Child's counsel]: Then, Your Honor, I do, frankly believe that the Court can overlook that. I think it is more difficult for the juvenile to overlook that. And I think it affects him and his participation in the trial. And I object on that basis as well."

Oregon has long recognized the right of adult defendants to be free from physical restraints during criminal trials. *State v. Smith*, 11 Or. 205, 8 P. 343 (1883). That right, which derives from the common law, as well as from the Fifth ***146** Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, protects the accused from "self-incrimination by mute testimony of a violent disposition." *State v. Moore*, 45 Or.App. 837, 839, 609 P.2d 866 (1980). Although most often invoked as a safeguard against potential jury prejudice, the right to stand trial unshackled also ensures that defendants may face the court " 'with the appearance, dignity and self-respect of a free and innocent [person].' " *State v. Kessler*, 57 Or.App. 469, 472, 645 P.2d 1070 (1982), quoting *People v. Harrington*, 42 Cal. 165, 10 Am.Rep. 296 (1871). As we stated in *Kessler:*

> "[T]he inferences the jury may draw is just one of the elements of prejudice to a defendant who is shackled. The shackles impinge on the presumption of innocence and the dignity of the judicial proceedings and may inhibit consultation with his attorney and his decision whether to take the stand as a witness." 57 Or.App. at 474, 645 P.2d 1070.

3 4 The right not to be shackled is not, however, absolute. A trial judge has "the discretion to order the shackling of a defendant if there is evidence of an immediate and serious risk of dangerous or disruptive behavior." *State v. Moore*, 45 Or.App. at 839–40, 609 P.2d 866. In exercising that discretion, the court must receive and evaluate relevant information and must make a record allowing appellate review of its decision. *Kessler*, 57 Or.App. at 473, 645 P.2d 1070. Although the information need not be presented ***860** in a formal adversary proceeding, "a conclusory statement alone by a prosecutor or law enforcement officer is not sufficient to permit the independent analysis necessary for the exercise of discretion." *State v. Schroeder*, 62 Or.App. 331, 337, 661 P.2d 111, *rev. den.* 295 Or. 161, 668 P.2d 380 (1983).

5 Notwithstanding our precedents recognizing adult defendants' rights to appear without physical restraint, we have not previously addressed the issue of shackling with respect to juvenile court proceedings. Child, citing those cases, argues that juveniles have the same right as adult defendants to appear free from physical restraints. We agree. "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527 (1967).

Although some of the concerns underlying *Kessler et al* do not apply in this context because there is no right to a ***147** jury in juvenile court proceeding, *State ex rel Juv. Dept. v. Reynolds,* 317 Or. 560, 574, 857 P.2d 842 (1993), two factors warrant our extension of the right against physical restraint to juvenile proceedings. First, the right to remain unshackled is based on considerations beyond the potential for jury prejudice, including inhibition of free consultation with counsel. *Kessler,* 57 Or.App. at 474, 645 P.2d 1070. *Accord Schroeder,* 62 Or.App. at 338 n. 5, 661 P.2d 111 (finding violation of due process where the defendant's shackles were not visible to the jury). That concern applies equally in the juvenile context.

Second, extending the right to remain unshackled during juvenile proceedings is consonant with the rehabilitative purposes of Oregon's juvenile justice system. *See generally Reynolds,* 317 Or. at 574, 857 P.2d 842. Allowing a young person who poses no security hazard to appear before the court unshackled, with the dignity of a free and innocent person, may foster respect for the judicial process. *See also In re Staley,* 67 Ill.2d 33, 7 Ill.Dec. 85, 364 N.E.2d 72 (1977) (extending to juveniles the right to remain unshackled in non-jury proceedings absent a showing that the accused posed a threat of escape).

6 Here, the court received no evidence that child posed an immediate and serious risk of dangerous or disruptive behavior and made no findings to that effect. Consequently, denial of child's motion to remove the leg chains was error. *Schroeder,* 62 Or.App. at 337–38, 661 P.2d 111.

7 The state argues, nevertheless, that that error was harmless. *See Schroeder,* 62 Or.App. at 338, 661 P.2d 111 (applying harmless error analysis to trial court's denial of defendant's motion to remove shackles). Because the error was of federal constitutional magnitude, we consider whether it was harmless beyond a reasonable doubt. *State v. Walton,* 311 Or. 223, 230–31, 809 P.2d 81 (1991); *Schroeder,* 62 Or.App. at 338, 661 P.2d 111.[3]

8 In *Kessler,* we identified three potential types of prejudice from shackling: (1) impingement on the presumption of innocence and the dignity of judicial proceedings; ***148** 2) inhibition of the accused's decision whether to take the stand as a witness; and (3) inhibition of the accused's consultation with his or her attorney. 57 Or.App. at 474, 645 P.2d 1070. We consider each in turn.

Child asserts that the presence of shackles affected the trial court's assessment of the evidence, particularly on critical issues of credibility. We note, however, that at the beginning of the delinquency proceeding, the juvenile court stated that the leg chains "won't affect the Court's view of the evidence here." Child's trial counsel concurred, stating that she "frankly believe[d] the court can overlook that," and made no record either during or after the proceeding as to any prejudicial impact on the juvenile court as the trier of fact. Child argues, nevertheless, that even if the presence of shackles did not somehow bias the court's assessment of his credibility, his demeanor itself—that is, the manner in which he presented himself to the ***861** court through posture, facial expressions, and the like—was affected by his shackling. Whatever the merits of such a consideration in a different case, it is unsupported on the record here. Based on our independent review of the evidence, we do not believe that the trial court's credibility determinations were impermissibly skewed.

As to the second and third potential sources of prejudice, there is no indication in this record that the leg chains adversely affected child's decision to testify, or inhibited him from consulting with counsel. Child did, in fact, testify, and presented his version of events without any suggestion of discomfort or reluctance. Similarly, the record shows that child did on occasion participate in counsel's colloquy with the court, and there is no indication that the right to consult was actually impaired in any fashion.

On this record, we are satisfied that the constitutional error in denying child's motion to be unshackled was harmless beyond a reasonable doubt. Accordingly, child is within the court's jurisdiction for committing an act which, if committed by an adult, would violate ORS 163.415.

Affirmed.

De MUNIZ, J., dissents.

***149** De MUNIZ, Judge, dissenting.

I agree that the juvenile court here made no record that child posed an immediate or serious risk of dangerous or disruptive behavior, and therefore erred in not ordering his leg irons removed. However, because I disagree that the error was harmless beyond a

reasonable doubt, I respectfully dissent.

In assessing the effect of the juvenile court's error, the majority focuses on the possible types of prejudice set out in *State v. Kessler,* 57 Or.App. 469, 474, 645 P.2d 1070 (1982) (risk of impinging on presumption of innocence and the dignity of judicial proceedings, as well as inhibiting consultation with counsel and decision whether to testify). The majority holds the error harmless beyond a reasonable doubt because it finds that child's appearance in leg irons did not prejudice the juvenile court as trier of fact, and that child did, in fact, testify and consult with counsel. 138 Or.App. at 148, 906 P.2d at 860–61. I disagree with the majority's harmless error analysis for two reasons.

First, in addition to the *Kessler* factors, I would also consider the potentially prejudicial effect on a child's *ability* to testify, because shackling is likely to be more psychologically jarring for children than adults. [1] Wearing leg irons may seriously undermine a child's confidence in telling his side of the story, which would adversely affect the credibility determinations of even the most experienced juvenile judge.

Second, central to the majority's harmless error analysis is child's failure to demonstrate how the shackling prejudiced him. Specifically, the majority notes that child's counsel "made no record either during or after the proceeding as to any prejudicial impact on the juvenile court as a trier of fact." 138 Or.App. at 148, 906 P.2d at 860. Because I believe that unnecessarily shackling children in a delinquency hearing is presumptively prejudicial, I would hold that child was not required to make a record of prejudice.

***150** This is no more than we grant adult defendants who are shackled without cause. In both *Kessler* and *State v. Bird,* 59 Or.App. 74, 650 P.2d 949, *rev. den.* 294 Or. 78, 653 P.2d 999 (1982), the state argued that the error was harmless because the defendants failed to prove how they were prejudiced by their unwarranted physical restraints. We held that

> "the prejudice to a defendant shackled or otherwise physically restrained during trial is *manifest and need not be proven in an individual case.* By showing that he was required to wear leg shackles, without a showing of substantial necessity, defendant has demonstrated a violation of his due process right to a fair trial." *Kessler,* 57 Or.App. at 474–75, 645 P.2d 1070; ***862** *Bird,* 59 Or.App. at 78, 650 P.2d 949 (quoting *Kessler*) (emphasis supplied). [2]

Similarly, in *Duckett v. Godinez/McKay,* 67 F.3d 734 (9th Cir1995), the Ninth Circuit refused to place the burden of proving prejudice on an adult habeas petitioner who had been shackled without compelling reasons during his sentencing hearing. *Id.* at 749. Although the petitioner had presented no evidence of prejudice at the trial level, the court declined to perform a harmless error analysis because "[t]he risk of doubt * * * is on the state." *Id.;* [3] *but see State v. Long,* 195 Or. 81, 244 P.2d 1033 (1952) (handcuffing the defendant during voir dire did not require reversal where potential jurors may not have seen handcuffs, defense counsel neither questioned or objected to any juror on that basis and where "there was reasonable grounds for precautions which were taken"). [4]

***151** If we do not require criminal defendants to demonstrate prejudice from unwarranted shackling, we cannot place that burden on juveniles. Physically restraining children without the proper findings not only violates the protections afforded adults, it also thwarts the historical purpose of Oregon's juvenile justice system.

Since 1907, the focus of this state's juvenile proceedings has been on "rehabilitation" of delinquents and not on "crime control." *State ex rel. Juv. Dept. v. Reynolds,* 317 Or. 560, 567, 857 P.2d 842 (1993). The purpose of a delinquency hearing is not to punish or convict, but rather to salvage, guide, and protect delinquent youths as wards of the court. *Id.* at 568, 857 P.2d 842. The role of a juvenile judge is fundamentally different from that of a judge in an adult criminal prosecution. The ultimate question in juvenile court is not guilt or innocence, but rather "what kind of care, custody, and control will best meet the needs of the child." *State v. Stewart,* 123 Or.App. 147, 155, 859 P.2d 545 (1993) (De Muniz, J., dissenting), *adhered to as modified* 126 Or.App. 456, 868 P.2d 794 (1994), *aff'd* 321 Or. 1, 892 P.2d 1013 (1995).

Leaving child in leg irons without finding that he is dangerous, disruptive or prone to escape is so far removed from the "best interest of the child" that prejudice is presumed. The burden is then on the state, as in *Kessler, Bird* and *Duckett,* to prove harmless error by demonstrating a lack of prejudice.

I am aware that the recently passed Juvenile Justice Task Force Bill (SB 1) replaces the

"best interest of the child" standard with the stated purpose of protecting the public, reducing juvenile delinquency and providing fair and impartial procedures for dealing with delinquent conduct.[5] Or.Laws 1995, ch. 422, § 1a(1). However, SB 1 becomes operative January 1, 1996. It was not the law at the time of child's hearing, and thus is not dispositive to this appeal. Furthermore, even if SB 1 effectively overrules *Reynolds* and makes delinquency hearings more akin to criminal prosecutions, that is all the more reason not to deny juveniles the protections afforded adult defendants.

**152* I also acknowledge that the majority would be correct in finding harmless error if there was "overwhelming evidence" that child committed an act, which if done by an adult, would constitute sex abuse in the third degree. *See State v. Schroeder,* 62 Or.App. 331, 338, 661 P.2d 111, *rev. den.* 295 Or. 161, 668 P.2d 380 (1983) (unwarranted shackling ***863* of adult defendant is harmless error beyond a reasonable doubt if there is "overwhelming evidence of his guilt"). However, in reviewing this record, I cannot conclude that such evidence exists.

This case is similar to *State v. Glick,* 73 Or.App. 79, 697 P.2d 1002 (1985). In *Glick,* we could not say that shackling the defendant without cause was harmless error beyond a reasonable doubt because the evidence came down to a credibility contest between the defendant and alleged victim. *Id.* at 83 n. 1, 697 P.2d 1002. In other words, we could not tell what effect, if any, the defendant's shackles had on the jury's credibility determinations.

Here, the dispositive issue, as conceded by child's counsel below, was not whether child touched the alleged victim, but whether he did so with the requisite intent of sexually gratifying either the victim or himself. As in *Glick,* the only witnesses to the underlying incident were these two parties, and the juvenile court judge essentially was asked to weigh the credibility of their conflicting accounts. I cannot conclude from the record that child's shackles did not affect his credibility,[6] and thus cannot say the failure to remove his leg irons was harmless error beyond a reasonable doubt.

I would remand for a new hearing, directing the juvenile court to allow child to appear without physical restraints, unless the court receives evidence and finds that child poses an immediate or serious risk of dangerous or disruptive behavior.

Parallel Citations

906 P.2d 857

Footnotes

1 ORS 163.415(1) provides, in part:

> "A person commits the crime of sexual abuse in the third degree if the person subjects another person to sexual contact; and
>
> "(a) The victim does not consent to the sexual contact[.]"

2 Child's argument appears to be based exclusively on federal constitutional protections, and he does not make a separate argument under the Oregon Constitution.

3 Because child does not assert that the shackling violated the Oregon Constitution, *see* n. 2, we do not consider whether there is "substantial and convincing evidence of guilt and little likelihood that the error affected the verdict." *Walton,* 311 Or. at 230–31, 809 P.2d 81 (citing *State v. Hansen,* 304 Or. 169, 180, 743 P.2d 157 (1987)).

1 The majority here apparently considered this factor because it found that child "presented his version of events without any suggestion of discomfort or reluctance." 138 Or.App. at 148, 906 P.2d at 861.

2 Although *Kessler* was a jury case in which we could more easily infer prejudice, its holding applies equally to prejudice in non-jury proceedings, *e.g.,* influencing the defendant's consultation with counsel and decision whether to testify. 57 Or.App. at 474, 645 P.2d 1070.

3 The *Duckett* court did not go as far as finding reversible error, but instead remanded for a hearing on prejudice. 67 F.3d at 749. However, *Duckett* was an appeal from an adult habeas corpus action governed by a different standard of review. We review juvenile delinquency hearings *de novo.* ORS

419A.200(5); ORS 19.125(3). Because *Kessler* and *Bird* presume prejudice absent a finding of substantial necessity, as in this case, we are not required to remand to the juvenile court for a hearing on prejudice.

4 It is unclear whether *Long* means that shackling errors are harmless unless the defendant makes a record of prejudice, or merely that shackling is not error if supported by "reasonable grounds." For reasons stated later in this dissent, I would resolve that uncertainty in child's favor.

5 Even under this new system, shackling a child without the requisite findings is not a "fair and impartial procedure."

6 The transcript of child's testimony shows many pauses, repetitions and unfinished sentences, as if he were hesitant and unsure of himself. Whether this is child's normal way of speaking, or the proceedings themselves made him nervous or the shackles undermined his confidence, I cannot say. Under *Kessler, Bird* and *Duckett,* however, the state has the burden to demonstrate that the shackling did not prejudice child.

End of Document © 2014 Thomson Reuters. No claim to original U.S. Government Works.

WestlawNext

RELATED TOPICS

Infants

Dependent, Neglected, and Delinquent Children

Robbery Victim Pretrial Identification of Juvenile

Criminal Law

Review

Clear Error Trial Court Findings of Fact

Claim of Error Involved Violation of Constitutional Right

In re R.W.S.
Supreme Court of North Dakota. March 5, 2007 728 N.W.2d 326 2007 ND 37 *(Approx. 14 pages)*

In the Interest of R.W.S., aka R.B.H., Child.
Tyrone Turner, Petitioner and Appellee,
v.
R.W.S., aka R.B.H., Child, Respondent and Appellant
and

No. 20060167. March 5, 2007.

Synopsis

Background: Juvenile was adjudicated delinquent in the Juvenile Court, Burleigh County, South Central Judicial District, Bruce B. Haskell, J., for committing the offenses of burglary, robbery, and disorderly conduct and was placed with the Division of Juvenile Services. Juvenile appealed.

Holdings: The Supreme Court, Maring, J., held that:
1 referee abused his discretion and violated juvenile's due process rights when he refused to remove juvenile's handcuffs and deferred the issue to law enforcement;
2 the trial court's failure to independently analyze whether to remove juvenile's handcuffs was harmless error; and
3 witness's in-court identification of juvenile did not create a substantial likelihood of irreparable misidentification.

Affirmed.

West Headnotes (13)

Change View

1 **Criminal Law** Questions of Fact and Findings
A finding of fact is clearly erroneous if there is no evidence to support it, if the reviewing court is left with a definite and firm conviction that a mistake has been made, or if the finding was induced by an erroneous view of the law.

2 Cases that cite this headnote

2 **Criminal Law** Review De Novo
The Supreme Court reviews questions of law de novo.

1 Case that cites this headnote

3 **Constitutional Law** Proceedings
Infants Course and conduct
Trial referee abused his discretion and violated juvenile's due process right to a fair trial when he refused to remove juvenile's handcuffs and deferred the issue to law enforcement, after juvenile requested the removal of his handcuffs during delinquency hearing; referee should have addressed the issue and considered juvenile's record, temperament, and the desperateness of his situation, the security situation at the courtroom and courthouse, juvenile's physical condition, and whether there was an adequate means of providing security that was less prejudicial. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

4 **Courts** Decisions of United States Courts as Authority in State Courts

When deciding a question of the violation of a federal constitutional right, the Supreme Court looks to federal courts for guidance.

5 **Infants** Manner and conduct of proceedings in general
The trial court's failure to independently analyze whether to remove juvenile's handcuffs during delinquency hearing was harmless error; juvenile was charged with robbery, burglary and disorderly conduct, and the evidence against juvenile was overwhelming, considering that witness had a clear view of juvenile as he saw juvenile leave his workshop with stolen items, he fought with juvenile, and he detained juvenile until police arrived, and second witness had a clear view of juvenile while he was detained and when he was escorted off of property by police.

2 Cases that cite this headnote

6 **Criminal Law** Prejudice to rights of party as ground of review
Federal constitutional errors do not automatically require reversal if it is shown that they were harmless, but before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

1 Case that cites this headnote

7 **Criminal Law** Prejudice to rights of party as ground of review
In declaring an error harmless beyond a reasonable doubt, the court must be convinced that the error did not contribute to the verdict.

2 Cases that cite this headnote

8 **Criminal Law** Prejudice to rights of party as ground of review
Before declaring an error harmless beyond a reasonable doubt, the court must review the entire record and determine, in light of all the evidence, the probable effect of any constitutional error upon a criminal defendant's rights.

1 Case that cites this headnote

9 **Criminal Law** Presumption as to Effect of Error; Burden
The burden is on the beneficiary of a constitutional error to prove the error is harmless beyond a reasonable doubt.

2 Cases that cite this headnote

10 **Infants** Age and identification
Witness's in-court identification of juvenile did not create a substantial likelihood of irreparable misidentification, even though juvenile was the only Native American male in the courtroom and was the only individual in handcuffs; witness had a clear view of juvenile when he saw juvenile leave his workshop with stolen items, and the juvenile attacked him and they fought, second witness had a clear view of juvenile while he was laying on the ground being detained by witness, and both witnesses identified juvenile less than six weeks after juvenile committed his offenses.

11 **Criminal Law** Review De Novo
The Supreme Court reviews federal constitutional questions de novo.

1 Case that cites this headnote

12 **Courts** Decisions of United States Courts as Authority in State Courts
Decisions of federal courts other than the United States Supreme Court, interpreting the United States Constitution are considered for guidance.

1 Case that cites this headnote

13 **Criminal Law** In-Court Identification in General
The admissibility of an in-court identification that is not preceded by a pretrial identification is to be determined by considering whether the in-court

identification procedure is unnecessarily suggestive and susceptible to a substantial likelihood of irreparable misidentification; then the court is to analyze the opportunity of witness to view criminal at scene of crime; the witness's degree of attention; the accuracy of his or her prior description of criminal; the level of certainty demonstrated at the confrontation; and the time between crime and confrontation to evaluate whether there is a substantial likelihood of irreparable misidentification.

1 Case that cites this headnote

Attorneys and Law Firms

*327 Tyrone J. Turner, Assistant State's Attorney, Bismarck, N.D., for petitioner and appellee; submitted on brief.

Bradley D. Peterson, Legal Services of North Dakota, Bismarck, N.D., for respondent and appellant; submitted on brief.

Opinion

MARING, Justice.

[¶ 1] R.W.S. ("Richard" [1]) appeals the juvenile court's orders adjudicating him a delinquent child and placing him with the North Dakota Division of Juvenile Services until March 2007. Richard argues he was denied a fair hearing by having to wear handcuffs and because the in-court identifications were impermissibly suggestive and unreliable. We hold the juvenile court *328 abused its discretion by failing to independently decide whether to remove Richard's handcuffs. We conclude, however, this was harmless error because there is overwhelming evidence of Richard's guilt. We further hold the juvenile court did not violate Richard's right to due process when it allowed the in-court identifications because they were not unnecessarily suggestive and did not lead to a substantial likelihood of irreparable misidentification. We affirm the juvenile court's orders.

I

[¶ 2] On April 18, 2006, a juvenile hearing, presided over by a juvenile court referee, was held to determine whether Richard was a delinquent child. Richard was accused of committing the delinquent offenses of burglary, robbery, and disorderly conduct. Richard was transported to the hearing in handcuffs and remained in handcuffs for the duration of the hearing. At the hearing, Richard asked to have his handcuffs removed. The referee responded: "Well, as I've been told by the presiding judge of the district that this is a matter to be determined by the sheriff's office since they're responsible for security. And so I've been told not to interfere with that decision." Robert and Carol Solberg, witnesses to the alleged offenses, testified at the hearing.

[¶ 3] The Solbergs have a workshop in their backyard. On March 7, 2006, Robert Solberg noticed the workshop's side door was open a few inches and he could see through the door's glass panel that an individual was inside. Robert Solberg yelled at the individual as he was leaving the workshop with a tool belt. The individual threw a wood chisel at Robert Solberg and then attacked him with the tool belt. Robert Solberg knocked the individual to the ground, then detained him. Robert Solberg's son, who had called the police, detained the individual while Robert Solberg inspected the workshop for missing items. When he returned from the shop, he resumed detaining the individual.

[¶ 4] When Carol Solberg heard there was an intruder, she went to the back door of the garage. She saw Robert Solberg standing on the back deck and the individual lying on the ground, facing her. The individual called her names and used inappropriate language. She had a clear view of the individual's face from five to six feet away as the police escorted the individual through the garage after his arrest. The individual was placed in the police vehicle and transported to the police station.

[¶ 5] During Robert Solberg's hearing testimony, he was asked to identify the individual he encountered on March 7, 2006. Solberg identified Richard, who was sitting next to his attorney. Richard's attorney stated: "I'd like the record to also reflect that [Richard] is the only Native American male in this courtroom. He's also the only person in this courtroom who's currently in handcuffs." When asked to identify the individual she saw on March 7, 2006, Carol Solberg pointed to Richard. Richard's attorney again asked that the record reflect that he was the only Native American male at the hearing and the only individual in handcuffs.

[¶ 6] The referee adjudicated Richard a delinquent child for committing the offenses of burglary, robbery, and disorderly conduct. Richard was ordered to be removed from the legal custody of his mother and placed in the custody of the North Dakota Division of Juvenile Services until March 7, 2007.

[¶ 7] Richard requested a review of the referee's order, arguing he was denied his constitutional right to a fair hearing by having to wear handcuffs, and that the in-court identifications were impermissibly *329 suggestive and unreliable. On review, the juvenile court affirmed the referee's order on the grounds that there was no showing of prejudice and the in-court identifications were supported by the evidence. Richard appeals the juvenile court's orders.

II

1 2 [¶ 8] Under N.D.R.Civ.P. 52(a), this Court reviews a juvenile court's factual findings under a clearly erroneous standard of review, with due regard given to the opportunity of the juvenile court to judge the credibility of the witnesses. *In re K.H.*, 2006 ND 156, ¶ 7, 718 N.W.2d 575. "A finding of fact is clearly erroneous if there is no evidence to support it, if the reviewing court is left with a definite and firm conviction that a mistake has been made, or if the finding was induced by an erroneous view of the law." *Interest of D.D.*, 2006 ND 30, ¶ 18, 708 N.W.2d 900. This Court reviews questions of law de novo. *In re K.H.*, at ¶ 7.

3 [¶ 9] Richard does not claim the juvenile court erred in finding him delinquent. Richard argues the juvenile court violated his constitutional rights by refusing to remove his handcuffs at the hearing without independently deciding the necessity of restraints. Richard contends the handcuffs denied him the ability to communicate with his lawyer and assist in his defense, impaired his physical movement and mental faculties, caused psychological harm, interfered with his ability to testify, and was an affront to the dignity of the hearing.

4 [¶ 10] This is a case of first impression for our Court, as we have not previously addressed the right of either adult defendants or juveniles to appear in court free from physical restraints. When deciding a question of the violation of a federal constitutional right, we look to federal courts for guidance. *See City of Bismarck v. Materi*, 177 N.W.2d 530, 538 (N.D.1970).

[¶ 11] The United States Supreme Court has recently stated that there is near consensus agreement that during a trial's guilt phase, "a criminal defendant has a right to remain free of physical restraints that are visible to the jury; that the right has a constitutional dimension; but that the right may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum." *Deck v. Missouri*, 544 U.S. 622, 628, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005); *see* ABA Standards for Criminal Justice: *Discovery and Trial by Jury* 15–3.2, pp. 188–91 (3d ed.1996).

[¶ 12] In *Deck*, the United States Supreme Court addressed "whether shackling a convicted offender during the penalty phase of a capital case violates the Federal Constitution." 544 U.S. at 624, 125 S.Ct. 2007. The Court held "that the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is 'justified by an essential state interest'—such as the interest in courtroom security—specific to the defendant on trial." *Id.* (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568–69, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) (emphasis omitted)); *see also Illinois v. Allen*, 397 U.S. 337, 343–44, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (holding restraints may be used when necessary to maintain dignity, order, and decorum in the courtroom). In so holding, the United States Supreme Court examined the reasons that motivate the guilt phase constitutional rule and determined they apply with similar force at the penalty phase, even though "shackles do not undermine the jury's effort to apply that presumption" of innocence because *330 the defendant has been convicted. *Deck*, 544 U.S. at 632, 125 S.Ct. 2007.

[¶ 13] In *Deck*, the United States Supreme Court reviewed the considerations that militate against the routine use of visible physical restraints during a criminal trial. *Id.* at 630–31, 125 S.Ct. 2007. The Court identified three fundamental legal principles: (1) "the criminal process presumes that the defendant is innocent until proved guilty," and visible physical restraints undermine that presumption, suggesting "to the jury that the justice system itself sees a need to separate a defendant from the community at large;" (2) "the Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel," and "[s]hackles can interfere with the accused's ability to communicate with his lawyer;" and (3) "judges must seek to maintain a judicial process that is a dignified process ... which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any

deprivation of an individual's liberty through criminal punishment." *Id.* (citations omitted).

[¶ 14] The United States Supreme Court applied these principles and concluded that the latter two considerations, securing a meaningful defense and maintaining dignified proceedings, militate against the routine use of visible physical restraints during the penalty phase of a criminal trial. *Id.* at 632, 125 S.Ct. 2007. The Court also concluded that although the jury was not deciding between guilt and innocence, it was deciding between life and death, an equally important decision. *Id.*

[¶ 15] With respect to a juvenile court proceeding, we recognize the concerns about the effect of visible physical restraints on a jury do not apply. However, we agree with those courts holding that juveniles have the same rights as adult defendants to be free from physical restraints. *See In the Matter of Millican,* 138 Or.App. 142, 906 P.2d 857, 860 (1995); *In re Staley,* 67 Ill.2d 33, 7 Ill.Dec. 85, 364 N.E.2d 72, 74 (1977). "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault,* 387 U.S. 1, 13, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). In *Millican,* the Court of Appeals of Oregon held that "two factors warrant our extension of the right against physical restraint to juvenile proceedings. First, the right to remain unshackled is based on considerations beyond the potential for jury prejudice, including inhibition of free consultation with counsel," and "[s]econd, extending the right to remain unshackled during juvenile proceedings is consonant with the rehabilitative purposes" of the juvenile justice system. 906 P.2d at 860 (citations omitted). "Allowing a young person who poses no security hazard to appear before the court unshackled, with the dignity of a free and innocent person, may foster respect for the judicial process." *Id.; see also In re Staley,* 7 Ill.Dec. 85, 364 N.E.2d at 74 (extending to juveniles the right to remain free from restraints in non-jury proceedings absent a showing of clear necessity for restraints).

[¶ 16] The United States Supreme Court, in *Deck,* also held that the constitutional requirement to be free from physical restraints is not absolute. 544 U.S. at 633, 125 S.Ct. 2007. The trial court, in the exercise of its discretion, may take account of special circumstances that call for restraints. *Id.* "But any such determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant." *Id.* The United States Supreme Court concluded that the trial court failed to provide reasons why *331 the shackles were necessary. *Id.* at 634–35, 125 S.Ct. 2007. Finally, the United States Supreme Court held:

> Thus, where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained.

Id. at 635, 125 S.Ct. 2007 (citation omitted).

[¶ 17] We conclude that the juvenile court had a duty to exercise its discretion when Richard requested that his handcuffs be removed during his adjudicatory hearing. The referee violated Richard's due process right to a fair trial when he failed to exercise his discretion and deferred to law enforcement. *See Lakin v. Stine,* 431 F.3d 959, 964 (6th Cir.2005) (holding the trial court's deference to a corrections officer was a violation of due process); *Woodards v. Cardwell,* 430 F.2d 978, 981–82 (6th Cir.1970) (holding the trial court abused its discretion by leaving the decision of whether to physically restrain to the sheriff); *In re A.H.,* 359 Ill.App.3d 173, 295 Ill.Dec. 709, 833 N.E.2d 915, 923 (2005) (holding the trial court, not the sheriff, has discretion to decide whether to leave a respondent in physical restraints); *State v. Carter,* 53 Ohio App.2d 125, 372 N.E.2d 622, 626–27 (Ct.App.1977) (holding the trial court's decision to allow the sheriff to determine if defendant was to be physically restrained was clearly erroneous); *Millican,* 906 P.2d at 860 (holding a conclusory statement by a law enforcement officer or prosecutor of a serious risk of dangerous behavior was not sufficient to meet the independent analysis necessary for the exercise of discretion); *State v. Roberts,* 86 N.J.Super. 159, 206 A.2d 200, 205–06 (1965) (holding the trial court had discretion whether to apply physical restraints).

[¶ 18] The factors the juvenile court should have considered are: the accused's record, temperament, and the desperateness of his situation; the security situation at the courtroom and courthouse; the accused's physical condition; and whether there was an adequate means of providing security that was less prejudicial. *Lakin,* 431 F.3d at 964.

5 6 7 8 9 [¶ 19] In the present case, the juvenile court made no findings that Richard posed an immediate and serious risk of dangerous or disruptive behavior or of escape or flight. Therefore, refusal to remove Richard's handcuffs was a

violation of his due process rights. Our analysis leads us to whether this violation was harmless error. "[F]ederal constitutional errors do not automatically require reversal if it is shown that they were harmless, but before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *State v. Chihanski*, 540 N.W.2d 621, 623 (N.D.1995). "In declaring this belief, the court must be convinced that the error did not contribute to the verdict." *Id.* "Furthermore, before making this declaration, the court must review the entire record and determine, in light of all the evidence, the probable effect of any constitutional error upon a criminal defendant's rights." *Id.* at 623–24. The burden is on the beneficiary of a constitutional error to prove the error is harmless beyond a reasonable doubt. *State v. Trieb*, 315 N.W.2d 649, 655 (N.D.1982).

[¶ 20] Here, the evidence in the record is overwhelmingly in support of the adjudication of guilt. Robert Solberg had a clear view of Richard as he left the Solbergs' workshop and had an extended close view of Richard as he fought off Richard, and *332 then as he detained Richard on the ground. Carol Solberg also had a clear view of Richard when he was on the ground and as he was escorted through the garage. The Solbergs both identified Richard as the individual they encountered on their property on March 7, 2006. Richard was never out of the sight of either the Solbergs or the police, and he was taken directly from the Solberg house to the police vehicle and then the police station. There is no doubt Richard committed the delinquent offenses of burglary, robbery, and disorderly conduct. *See In re A.H.*, 295 Ill.Dec. 709, 833 N.E.2d at 924 (holding the father's deprivation of his child was supported by overwhelming evidence, therefore, the trial court's failure to analyze need for physical restraints was harmless beyond a reasonable doubt). Here, the juvenile court violated Richard's due process rights, but the error was harmless beyond a reasonable doubt because of the overwhelming evidence against Richard.

III

10 [¶ 21] Richard argues that the in-court identifications at the hearing were impermissibly suggestive and unreliable and, therefore, denied him a fair hearing.

11 [¶ 22] We review federal constitutional questions de novo. *State v. Campbell*, 2006 ND 168, ¶ 6, 719 N.W.2d 374, *cert. denied*, 549 U.S. 1180, 127 S.Ct. 1150, 166 L.Ed.2d 993 (2007).

[¶ 23] In *State v. Norrid*, 2000 ND 112, 611 N.W.2d 866, we addressed the question of whether an out-of-court identification must be suppressed because it was so unnecessarily suggestive and conducive to irreparable mistaken identification to constitute a denial of due process. In *Norrid*, we analyzed the United States Supreme Court decisions concerning eyewitness identifications. *Id.* at ¶¶ 7–13. These decisions all deal with the exclusion of an impermissibly suggestive out-of-court identification or an in-court identification that has been tainted by suggestive pretrial identifications. *See Neil v. Biggers*, 409 U.S. 188, 200–01, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *Stovall v. Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *United States v. Wade*, 388 U.S. 218, 241, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). Whether the five factors set out in *Neil v. Biggers*, and again in *Manson v. Brathwaite*, apply to initial in-court identifications has not to date been addressed by the United States Supreme Court.

[¶ 24] The Eighth Circuit Court of Appeals has concluded that a defendant's claim that a first-time in-court identification was made under impermissibly suggestive procedures does implicate the defendant's right to constitutional due process and the *Biggers* and *Manson* factors apply. *United States v. Murdock*, 928 F.2d 293, 297 (8th Cir.1991); *United States v. Davis*, 103 F.3d 660, 669–70 (8th Cir.1996). However, the South Carolina Supreme Court has held: "We conclude, as the majority of courts have, that *Neil v. Biggers* does not apply to in-court identifications and that the remedy for any alleged suggestiveness of an in-court identification is cross-examination and argument." *State v. Lewis*, 363 S.C. 37, 609 S.E.2d 515, 518 (2005). The rationale provided by the South Carolina Supreme Court is "these extra safeguards are not applicable to an in-court identification because the witness' testimony is subject to the same rules of evidence, witness credibility, and cross-examination as all testimony in a criminal trial." *Id.; see also United States v. Domina*, 784 F.2d 1361, 1368–69 (9th Cir.1986) (holding in-court *333 identification is reviewed under an abuse of discretion standard).

12 [¶ 25] We have held: "Our court looks to decisions of other states for guidance, but it is not bound by those decisions. In respect to questions involving the United States Constitution, not only does our court receive guidance from the decisions of the United States Supreme Court, but it is bound by those decisions." *City of Bismarck v. Materi*, 177

N.W.2d 530, 538 (N.D.1970). Decisions of federal courts other than the United States Supreme Court, interpreting the United States Constitution are considered for guidance. *See generally State v. Lamb*, 541 N.W.2d 457, 459 n. 2 (N.D.1996) (stating that federal decisions construing federal rules similar to our state's rules are considered for guidance.); *Opp v. Source One Management, Inc.*, 1999 ND 52, ¶ 12, 591 N.W.2d 101 (holding when we are interpreting the ND Human Rights Act, we will look to federal interpretations of Title VII for guidance).

[¶ 26] In *Norrid*, we stated that the United States Supreme Court, in *Stovall v. Denno*, held "identification testimony must be suppressed if, under the totality of the circumstances, the procedure for identification 'was so unnecessarily suggestive and conducive to irreparable mistaken identification' to constitute a denial of due process." 2000 ND 112, ¶ 8, 611 N.W.2d 866 (quoting *Stovall*, 388 U.S. at 302, 87 S.Ct. 1967). We noted: "Under the *Stovall* due process test, the determination of the admissibility of an identification involves a two-pronged analysis of (1) whether the identification procedure is impermissibly suggestive, and (2) if so, whether the identification nevertheless is reliable under the totality of the circumstances." *Norrid*, at ¶ 10. We also held the defendant has the burden of proving the identification procedure is impermissibly suggestive, and the State must then show the identification is reliable under the totality of the circumstances. *Id.* Further, we held: "even if an identification procedure is unnecessarily or impermissibly suggestive, there is no due process violation requiring exclusion of identification evidence if the identification is reliable under the totality of the circumstances...." *Id.* ¶ 13. Determining reliability requires the consideration of several factors: " 'The opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.' " *Id.* (quoting *Biggers*, 409 U.S. at 199–200, 93 S.Ct. 375). The Eighth Circuit Court of Appeals has analyzed a defendant's claim that a first-time in-court eyewitness identification violated his due process rights because the procedure was impermissibly suggestive and unreliable under the very framework we applied in *Norrid*. *United States v. Murdock*, 928 F.2d 293 (8th Cir.1991); *United States v. Davis*, 103 F.3d 660 (8th Cir.1996).

[¶ 27] In *Murdock*, the defendant argued the in-court identification testimony was tainted because he was seated at the defense counsel table and was the only African–American in the room. *Murdock*, 928 F.2d at 297. The *Murdock* Court held, under *Manson*, in addressing these claims "we must apply the two part test" and "[f]irst, we must decide whether the challenged confrontation was impermissibly suggestive. If it was, we must then determine whether, under the totality of the circumstances, the suggestive procedures created 'a very substantial likelihood of irreparable misidentification.' " *Murdock*, 928 F.2d at 297 (quoting **334 Manson*, 432 U.S. at 116, 97 S.Ct. 2243). The Eighth Circuit Court of Appeals then held that in making this second determination it must consider the *Biggers* and *Manson* five factors. *Murdock*, 928 F.2d at 297. The court stated that it does not require pretrial lineups precede in-trial identifications and, therefore, the only issue in this case was whether Murdock's "presence at the defense table, combined with his being the only African–American in the courtroom at the time of the identification, constituted impermissibly suggestive procedures." *Id.* The court concluded: "[W]hile it may have been suggestive, it was not impermissibly suggestive. Even if the procedure was impermissibly suggestive, under the totality of the circumstances, there was no substantial likelihood of misidentification." *Id.* The court applied the *Biggers* five factors noting that facts supported that the witnesses had a substantial amount of time to view the defendant, the witness were fairly attentive during the crime, the witnesses were very certain about the defendant's identify, and the identifications took place within a reasonable period after the crime. *Id.*

[¶ 28] In *United States v. Davis*, 103 F.3d 660 (8th Cir.1996), the Eighth Circuit Court of Appeals again reviewed a defendant's claim that a first-time in-court identification violated his constitutional right to procedural due process. In that case, the court stated: " 'Reliability is the linchpin in determining the admissibility of identification testimony.' " *Id.* at 669 (quoting *Manson*, 432 U.S. at 113–14, 97 S.Ct. 2243). The court again applied the due process formulation emanating from *Stovall*, 388 U.S. at 302, 87 S.Ct. 1967, and the totality of the circumstances standard and the factors outlined in *Biggers*, 409 U.S. at 199–200, 93 S.Ct. 375 and *Manson*, 432 U.S. at 114, 97 S.Ct. 2243. *Id.* 669–70. In *Davis*, the defendant contended that the first-time in-court identification was made under "an impermissibly suggestive procedure because Davis was the only African–American male seated at the defense counsel table, and the only other African–American individual present was a man in the back of the courtroom." *Id.* at 670. The court noted that the defendant "made a specific objection to the racial composition of the courtroom and requested that he not be seated at counsel table during the identification procedures." *Id.* The Eighth Circuit Court of

Appeals held: "We agree with the Ninth Circuit's assessment that 'there is no constitutional entitlement to an in-court line-up or other particular methods of lessening the suggestiveness of in-court identification, such as seating the defendant elsewhere in the room. These are matters within the discretion of the court.' " *Id.* (citing *Domina*, 784 F.2d at 1369). The Eighth Circuit Court of Appeals concluded that given "the total circumstances, the arguably suggestive nature of the in-court identification was not so impermissibly suggestive as to create 'a very substantial likelihood of irreparable misidentification.' " *Id.* at 671 (quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)). The court pointed out that the prosecutor's questions were not suggestive, the witness' in-court identification was vigorously attacked on cross-examination, and that under the five factors analysis other circumstances indicated the witness' testimony was reliable. *Id.* at 670.

[¶ 29] Two recent cases, *United States v. Jaeger*, 298 F.Supp.2d 1003 (D.Hawai'i 2003), and *Louisiana v. Jordan*, 813 So.2d 1123 (La.Ct.App.2002), have applied the five factor test from *Biggers* to in-court identifications that were not preceded by pretrial identifications.

[¶ 30] In *Jaeger*, 298 F.Supp.2d at 1005, the defendant was charged with distributing a controlled substance to an undercover **335* police officer. The defendant argued that because a pretrial identification was not conducted and a considerable amount of time had passed from the alleged sale to the trial, in-court identifications should have been excluded or safeguards should have been implemented to prevent prejudice. *Id.* at 1005. The United States District Court for the District of Hawaii held the decision to allow an in-court identification is left to the court's discretion and "[t]hat discretion is abused only when the in-court identification testimony given is 'so unnecessarily suggestive and conducive to irreparable misidentification as to amount to a denial of due process of law....' " *Id.* at 1007 (quoting *Domina*, 784 F.2d at 1369). The *Jaeger* court then applied the *Biggers* factors to determine the reliability of the in-court identification testimony. 298 F.Supp.2d at 1007–08. The court concluded that the in-court identification did not present a substantial likelihood of misidentification. *Id.* at 1008.

[¶ 31] In *Jordan*, 813 So.2d at 1128, the defendant was charged with armed robbery. The victim had viewed the defendant for three to four minutes. *Id.* at 1127. The victim identified the defendant for the first time at trial. *See id.* at 1129. The defendant argued that the court should have excluded the in-court identification on the grounds it was unreliable because the defendant was not identified before the trial. *Id.* at 1130. The court considered the *Manson* factors when it evaluated the reliability of the witness's in-court identification. *Jordan*, 813 So.2d at 1130. "Even if the identification procedure is suggestive, an identification will be permissible if there is not a very substantial likelihood of irreparable misidentification." *Id.* "The opportunity to crossexamine a witness about his in-court identification of the defendant as the perpetrator of a crime will ordinarily cure any suggestiveness of such an identification." *Id.* The court concluded that application of the *Biggers* factors established that "the in-court identification of defendant was permissible because there did not exist a substantial likelihood of irreparable misidentification." *Id.*

[¶ 32] In *United States v. Perez–Gonzalez*, 445 F.3d 39, 43 (1st Cir.2006), the defendant was charged for involvement in a riot on government property. Prior to trial, law enforcement officials viewed videos of the riot that included the defendant's image. *Id.* The officials identified the defendant for the first time at trial. *See id.* at 48. The defendant argued that the in-court identifications were improperly suggestive and they were likely to lead to misidentification, and that he should have been allowed to sit in the gallery and given an in-court line-up. *Id.* When evaluating an in-court identification, a court first looks to whether an inappropriately suggestive procedure was used. *Id.* If a suggestive procedure is used, the court must decide whether the identification was nonetheless reliable under the totality of the circumstances. *Id.* The Court held exclusion or prohibition of an in-court identification is appropriate only if the court finds a very substantial likelihood of irreparable misidentification. *Id.*

13 [¶ 33] We hold that the admissibility of an in-court identification that is not preceded by a pretrial identification is to be determined by applying the same analysis we applied in *Norrid* considering whether the in-court identification procedure is unnecessarily suggestive and susceptible to a substantial likelihood of irreparable misidentification. The five *Biggers* and *Manson* factors are to be used to evaluate whether there is a substantial likelihood of irreparable misidentification.

**336* [¶ 34] We recognize the potential for suggestiveness in an initial in-court identification. The in-court identifications of Richard were suggestive because he was the only Native American male in the courtroom, the only individual in handcuffs, and was sitting alone with

his attorney at the defense table. Richard never requested, however, procedures at trial that may have lessened the suggestiveness of the in-court identifications. Any suggestiveness was reduced by Richard's opportunity to cross-examine the witnesses and his ability to raise doubts about the accuracy of the identifications. During cross-examination, Richard questioned the witnesses about their encounters with the intruder. Richard had the opportunity to expose possible weaknesses in their identifications, thereby reducing the suggestiveness of the in-court identifications. We conclude that the procedure was not impermissibly suggestive.

[¶ 35] Even if it was impermissibly suggestive, applying the *Biggers* and *Manson* factors to this case, the in-court identifications of Richard did not create a substantial likelihood of irreparable misidentification. Robert Solberg had an excellent view of Richard as he threw the chisel, as Richard attacked him, and as they fought. Both Robert and Carol Solberg had a clear view of Richard as he lay on the ground after being detained by Robert Solberg. Both witnesses devoted their exclusive attention to Richard as he lay on the ground. A prior description of Richard was not necessary because Robert Solberg personally handed over Richard to the police. Richard was apprehended and detained by Robert Solberg while in the commission of his crimes and never left the scene, providing Robert and Carol Solberg certainty that Richard was the intruder. Robert and Carol Solberg witnessed Richard's crimes on March 7, 2006. A juvenile hearing took place on April 18, 2006. Less than six weeks from the witnessing of a crime to the in-court identification is a minimal amount of time.

[¶ 36] Application of the *Biggers* and *Manson* factors establishes that the in-court identifications were properly admitted because there was not a substantial likelihood of irreparable misidentification. Therefore, the juvenile court did not violate Richard's due process rights when it allowed the in-court identifications of Richard.

IV

[¶ 37] In conclusion, the juvenile court violated Richard's due process rights by failing to independently and properly analyze whether to remove Richard's handcuffs; however, this was harmless error because there is overwhelming evidence of guilt in this record. The juvenile court did not violate Richard's due process rights in admitting the in-court identifications because they did not lead to a substantial likelihood of irreparable misidentification. We affirm the juvenile court's orders.

[¶ 38] GERALD W. VANDE WALLE, C.J., and SONJA CLAPP, D.J., and DANIEL J. CROTHERS, and CAROL RONNING KAPSNER, JJ., concur.

[¶ 39] The Honorable SONJA CLAPP, D.J., sitting in place of SANDSTROM, J., disqualified.

Parallel Citations

2007 ND 37

Footnotes

1 The party's name is a pseudonym.

End of Document © 2014 Thomson Reuters. No claim to original U.S. Government Works.

WestlawNext

RELATED TOPICS

Criminal Law
Trial
Matters of Restraint of Defendants
(Approx. 15 Pages)

Infants
Dependent, Neglected, and Delinquent Children
Claim Impugned Juvenile Court Initial Jurisdictional Finding

Establishment, Organization, and Procedure
United States Supreme Court Interpretation

Tiffany A. v. Superior Court
Court of Appeal, Second District, Division 7, California. May 21, 2007 150 Cal.App.4th 1344 59 Cal.Rptr.3d 363 07 Cal. Daily Op. Serv. 5600

---------- ----, - ----------,

v.

The SUPERIOR COURT of Los Angeles County, Respondent;
People of the State of California, Real Party in Interest.

No. B193134. May 21, 2007.

Background: Minor who appeared in juvenile delinquency court filed motion to prohibit use of shackles upon minors in the courtroom in the absence of an individualized evidentiary showing of manifest need. The Superior Court, Los Angeles County, No. MJ11172, Richard E. Naranjo, J., denied the motion. Minor filed petition for a writ of prohibition directing trial court to set aside its order denying the motion.

Holding: The Court of Appeal, Woods, J., held that juvenile delinquency court could not use physical restraints upon all minors who appeared in court proceedings absent an individualized determination of need.

Writ granted.

West Headnotes (10)

Change View

1 **Prohibition** Acts and Proceedings of Courts, Judges, and Judicial Officers
A petition for a writ relief is the appropriate means of obtaining review of court policies.

2 **Infants** Dismissal and mootness
Court of Appeal would exercise its discretion to resolve the issue of whether it was proper to use physical restraints upon all minors who appeared in juvenile court proceedings absent an individualized determination of need for the restraints, notwithstanding that the minor who petitioned for relief had already been released from custody; exception to the mootness doctrine applied since the petition posed an issue of important public interest that was likely to recur, but due to the relatively short duration of the proceedings, was likely to evade review.

3 **Criminal Law** Review De Novo
In ruling on the use of physical restraints upon all minors in juvenile court proceedings absent an individualized determination of need for such restraints, Court of Appeal would decline to appoint a special master or a referee to conduct an evidentiary hearing into the policy, inasmuch as an evidentiary hearing would not have proven useful to the court in deciding whether it could adopt a blanket policy requiring use of physical restraints upon all minors.

1 Case that cites this headnote

4 **Infants** Course and conduct
Juvenile delinquency court could not use physical restraints upon all minors who appeared in court proceedings absent an individualized determination of need for the restraints; any decision to shackle a minor who appeared in juvenile delinquency court for a court proceeding was required to be based on the non-conforming conduct and behavior of that individual minor, and the decision to

shackle a minor had to be made on a case-by-case basis.

See 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 11 et seq.; Cal. Jur. 3d, Criminal Law: Rights of the Accused, § 193 et seq.

2 Cases that cite this headnote

5 **Criminal Law** Discretion of court
Criminal Law Custody and restraint of accused
The decision whether to shackle a defendant is discretionary; a reviewing court will uphold the court's decision absent an abuse of discretion.

2 Cases that cite this headnote

6 **Criminal Law** Discretion of Lower Court
While a trial court's discretionary order is presumed correct, and error must be affirmatively shown, nonetheless an abuse is demonstrated where the court's order appears to lack all evidentiary support in the record or is based on erroneous legal principles.

1 Case that cites this headnote

7 **Criminal Law** Evidentiary matters
The burden is upon the People to establish a need for physical restraints used on the accused.

1 Case that cites this headnote

8 **Criminal Law** Custody and Restraint of Accused
Criminal Law Custody and restraint of accused
It is the trial court, not law enforcement personnel, that must make the decision that an accused be physically restrained in the courtroom; a trial court abuses its discretion if it abdicates this decision-making responsibility to security personnel or law enforcement.

9 **Criminal Law** Grounds and circumstances affecting use of restraints in general
The type of proceeding determines the amount of need that the court must find to justify the use of physical restraints on a defendant; if the proceeding is before a jury, manifest necessity is clearly required.

1 Case that cites this headnote

10 **Courts** Decisions of United States Courts as Authority in State Courts
Decision of federal district court was not binding on California Court of Appeal.

Attorneys and Law Firms

***364** Janice Y. Fukai, Alternate Public Defender of Los Angeles County, Felicia Kahn Grant and Stephanie Bedi, Deputy Alternate Public Defenders, for Petitioner.

No appearance for the Respondent.

Steve Cooley, District Attorney of Los Angeles County, Lael Rubin and Patrick D. Moran, Deputy District Attorneys, for Real Party in Interest.

Manning & Marder Kass Ellrod, Ramirez and Steven J. Renick for Los Angeles County Sheriff's Department as Amicus Curiae on behalf of Real Party in Interest.

Opinion

WOODS, J.

*1348 Tiffany A. seeks a writ of prohibition directing the lower court to set aside its order denying her motion to preclude the use of physical restraints upon all minors who appear in juvenile court proceedings in the Lancaster Juvenile Delinquency Court absent an individualized determination of need for the restraints. Petitioner complains the juvenile

delinquency court's general policy requiring all minors to be shackled is contrary to the established law concerning the appropriate use of physical restraints during court proceedings. The Real Party in Interest, the People and Amicus Curiae, the Los Angeles County Sheriff's Department assert, *inter alia*, the requisite showing of need for the use of restraints depends on the type of court ***365** proceeding. They claim that where the proceedings are before a judge rather than a jury, do not involve witnesses, and are brief and/or uncontested, the necessary showing of need is far less, and does not have to be particularized as to the individual. Thus, as the respondent court did in denying the motion below, they defend the general policy arguing the use of restraints in the Lancaster courtroom for all minors is warranted based on safety concerns arising from the design of the courthouse facility as well as the lack of sufficient numbers of security personnel available to monitor the courtroom. Finally, they defend the use of the policy claiming that the case law limiting the use of restraints in the courtroom arises only in the context of criminal proceedings involving adults, and thus this case law should not be applied in the context of juvenile delinquency proceedings. As we shall explain, the court's reasons for denying the petitioners motion, and the Real Party and the Sheriff's Department's reasons for defending the policy, are without merit. In our view, the use of physical restraints upon minors who appear in the Lancaster Juvenile Delinquency Court must be based on a showing that such restraints are necessary for each individual minor irrespective of the type of hearing or proceeding. Consequently, we issue the writ of prohibition.

FACTUAL AND PROCEDURAL BACKGROUND

The Policy for the Use of Ankle Restraints on Minors

Juvenile delinquency matters are heard in Department 285 in the Alfred J. McCourtney Juvenile Justice Center in Lancaster California. Though a total ***1349** of six sheriff's deputies are assigned to the courthouse, only one deputy is assigned as a bailiff in Department 285. [1] Department 285 has four exit doors from the courtroom and a number of those doors lead to unsecured exits, public areas and/or to outside the building.

The juvenile court in Department 285 has a practice and policy to put ankle shackles on all detained minors who appear in the courtroom for all proceedings. This policy has been in place for at least two years. [2] The policy of shackling minors while in the courtroom was adopted because of the number of unlocked exits and unsecured hallways in the courtroom and because the lack of sheriff's personnel available to monitor the facility. According to the Sheriff's Sergeant in charge of the security and custody at the courthouse, the risk of minors escaping the courtroom is significant given the design of the courtroom and location of the courthouse. The Sheriff's Sergeant opined the use of shackles on all minors has prevented escape attempts and allowed order to be maintained in the courthouse. The Sheriff's Sergeant concluded the use of ankle restraints upon minors "is like having another deputy present.... Just as having a deputy at the minor's side causes him or her to think twice about any attempt to escape or to cause trouble, so to do ankle restraints, which every minor immediately realizes eliminates any possibility of making a serious escape attempt. If we had a ***366** different facility—with locked doors, secured hallways and courtrooms, sally ports, etc.—it might be possible to maintain security without the use of the ankle restraints. But in this facility, ankle restraints are the simplest, least intrusive [3] method of maintaining security."

The Case of Tiffany A.

Petitioner became the subject of a wardship petition brought under Welfare and Institutions Code section 602. The petition alleged 16–year–old Tiffany A. committed the crime of unlawful taking of a vehicle (i.e., a car belonging to ***1350** her mother) in violation of Vehicle Code section 10851, subdivision (a). On June 1, 2006, at an uncontested pre-disposition hearing, Tiffany A. objected to the fact that she was shackled with leg chains during the proceedings.

> Her counsel stated: "Your honor, Tiffany is shackled with leg chains because she is in custody. We would object to her being shackled because of the fact that the court cannot use restraints without showing a manifest need, we're citing *People v. Frier* [sic] (1991) 1 Cal.4th 173, 3 Cal.Rptr.2d 426, 821 P.2d 1302. So at this point we would ask the court to remove the shackles."
>
> The Court: "Okay. Your request is denied. The case you are citing does not apply to juveniles.... The main reason the minors that are in custody are shackled is because we do not have a secure egress and ingress to this courtroom like we did in the old building. But your objection is noted and overruled...."

Thereafter on June 16, 2006, petitioner filed a motion to prohibit the use of shackles upon

minors in the courtroom,[4] asking the court to make an order prohibiting the Sheriff from using such physical restraints, unless the shackling had been ordered by the court based on an individualized evidentiary showing of "manifest need." Petitioner's counsel also attached her declaration stating that all of her clients are brought into the courtroom in leg shackles for all court appearances. She also stated she had been told the reason for the use of the restraints related to the inadequate security in the building housing the courthouse.

At the June 19, 2006, hearing on the motion, the court ruled as follows:

> "[A]s I said before on this subject, there are no cases in California law dealing with minors on this issue.
>
> "From what I am reading, that a lot of these cases started out dealing with the defendant being handcuffed, shackled in the presence of the jury. And that was ruled by the court, you can't do that, understandably so, you don't want the jury to be prejudiced. There is not jury in Juvenile. The court is the jury. ***1351** They have even gone—some of these cases, they indicate that the defendant can't be shackled at arraignment or any post pre-trial hearing unless there is a showing that they need to be. And ****367** again, however, though nothing to address Juveniles.
>
> "As I said before, in this courthouse, before the minors even get to the courtroom, once they are taken from the secure holding area that probation maintains, there are multiple avenues of escape that could be used by any minor who is in—being detained. And the court, because of that security issue, has always required that the minor come into court in a contained status, to remain shackled to prevent escape.
>
> "So the court has reviewed your motion. And for the reasons I have stated, the court will deny it."

1 On August 16, 2006, petitioner filed this petition for a writ of prohibition, requesting an order (1) directing the superior court to set-aside its June 19, 2006, order denying her motion to prohibit shackling minors by the Sheriff's Department absent an individualized showing of need for the restraints; and (2) directing the superior court to issue an order granting the motion.[5] The People, designated as the Real Party in Interest, filed a return to the petition and this court permitted the Sheriff's Department to file an amicus brief in the matter.

On September 26, 2006, petitioner was released from custody.

DISCUSSION

In this court, petitioner asserts the Juvenile Delinquency Court in Lancaster erred in denying her request for an order prohibiting the use of physical restraints on all minors appearing before it without first making an individual determination for the need of the restraints. Before addressing this issue, however, we consider a few preliminary matters concerning whether this court should reach the merits. Specifically, the People and the Sheriff's Department assert this court should not consider the petition because it is moot as to the petitioner. The Sheriff's Department also requests that rather than ruling on the merits of the petition this court should order an evidentiary ***1352** hearing so that the Sheriff's Department can appear as a party and present evidence concerning the court's policy. To these preliminary issues we now turn our attention.

I. Mootness.

2 Petitioner concedes she has been released from custody and may not be subject to the juvenile court's shackling policy again. Thus, she admits the relief sought in the petition is effectively moot as to her. Nonetheless petitioner requests this court exercise its inherent discretion to resolve the issue presented by the petition because it concerns a current and ongoing policy of the Juvenile Delinquency Court in Lancaster that requires all minors remain shackled throughout court proceedings. Consequently, she argues that the harm to minors will re-occur on a daily basis and yet may, given the nature of the proceedings, evade review. Both the People and the Sheriff's Department urge this court to deny the petition for mootness. The Sheriff's Department also points out that in her petition, petitioner sought an order preventing her from being shackled, and that the court was not asked to address the larger issue of any policy regarding the shackling of *all* minors at the Lancaster court.

The courts have developed various doctrines to permit the appellate review of a case in which it is no longer possible to remedy the injury giving rise to the request ****368** for review. One exception to the mootness doctrine applies to those controversies that are capable of

repetition and yet evading review. (*In re William M.* (1970) 3 Cal.3d 16, 24, 89 Cal.Rptr. 33, 473 P.2d 737; *United States v. Howard* (9th Cir.2007) 480 F.3d 1005, 1009–1010.) This is such a case. In our view, this petition poses an issue of important public interest concerning the treatment of minors in our juvenile delinquency court system that is likely to reoccur in view of the Juvenile Court's on-going policy of shackling of all minors during court appearances. (See *Oregon Advocacy Center v. Mink* (9th Cir.2003) 322 F.3d 1101, 1118 [cases are "capable of repetition" in this context where a party is challenging an ongoing government policy].) Yet, given the relatively short duration of the proceedings, and the pace through which many minors move through the court and the wardship system, this issue may evade review for a significant period of time. In addition, although the petitioner styled her petition to request only a remedy for herself, it is also clear that even if she had fashioned it broadly to request relief for all minors who appear in the Lancaster Juvenile Delinquency proceedings, the result would have been the ***1353** same—the lower court would have denied it. Indeed, the court sought to defend the policy generally for all minors; the court's rationale for denying the motion was not focused specifically on petitioner.

Consequently, this court exercises its discretion to resolve the underlying issue in the petition concerning the legality of the lower court's shackling policy even though as to the petitioner the matter is moot. (*In re Sheena K.* (2007) 40 Cal.4th 875, 879, 55 Cal.Rptr.3d 716, 153 P.3d 282; see also *United States v. Howard* (9th Cir.2006) 463 F.3d 999, 1003–1004 [9th Circuit reviewed the propriety of a district-wide policy of shackling all criminal pretrial detainees during their first court appearance even though the claim was moot as to the named defendants].)

II. Evidentiary Hearing.

3 The Sheriff's Department requested that rather than rule on the merits of the petition and grant the relief requested, this court should appoint a special master or a referee pursuant to Code of Civil Procedure section 909 and California Rules of Court rule 22[6] to conduct an evidentiary hearing into the policy. We decline this request.

We observe the Sheriff's Department and the People have submitted declarations[7] from the Deputy District Attorney assigned to Department 285 and from the Sheriff's Department Sergeant in charge of courtroom security and juvenile detentions at the courthouse. These declarations attest in detail and at length concerning the practices and policies relating to the use of physical restraints for detained minors at the facility. Both declarations provide evidence concerning the security concerns in the courtroom and courthouse and the need for the use of physical restraints in all juvenile delinquency matters. ***369** Notwithstanding this evidence, the Sheriff's Department asserts that such declarations are "no substitute for a full evidentiary hearing, at which multiple witnesses can be examined and cross-examined, documents can be introduced into evidence and views can be taken of the relevant portions of the courthouse." Nonetheless, the Sheriff's Department has not specifically identified any additional ***1354** evidence it would present at such a hearing, nor explained how such evidence would improve upon or supplement that already submitted to this court. Moreover, at bottom the issue before this court is not whether the Juvenile Delinquency Court's and the Sheriff's Department's concerns over security at the Lancaster Juvenile Courthouse are credible. Instead, the issue before this court is whether the juvenile delinquency court can legally adopt a blanket policy requiring the use of physical restraints for all minors at all court proceedings without requiring an additional showing of need for restraints for each minor. We are simply not convinced that delaying these proceedings to conduct an evidentiary hearing would prove useful for our resolution of the issues.

III. Policy for the Use of Physical Restraints.

4 Before this court, petitioner asserts the juvenile delinquency court erred in concluding that courtroom safety, standing alone, is a sufficient justification to establish a general policy to shackle *all* minors who appear before it at every court proceeding. Petitioner contends that to justify the use of physical restraints in the courtroom the court must first make an individual determination of "manifest need" for each minor.

The People and the Sheriff's Department disagree, contending: (1) where the proceeding does not require the appearance of witnesses, or a jury is not present, or the proceeding is non-adversarial and/or brief in duration "manifest need" for the use of restraints is not required; (2) an individual determination as to each minor is not legally required to justify the use of restraints; and (3) the law limiting the use of shackles should only apply in the context of criminal matters involving adults, not to juvenile delinquency proceedings.[8] With the contentions of the parties in mind, we turn to the prevailing law governing the use of physical restraints in the courtroom.

5 6 The decision whether to shackle a defendant is discretionary; a reviewing court will uphold the court's decision absent an abuse of discretion. (See *People v. Hawkins* (1995) 10 Cal.4th 920, 944, 42 Cal.Rptr.2d 636, 897 P.2d 574; *People v. Duran* (1976) 16 Cal.3d 282, 291, 127 Cal.Rptr. 618, 545 P.2d 1322 ["In interest of minimizing the likelihood of courtroom violence or other disruption the trial court is vested, upon a proper showing, ***1355*** with discretion to order the physical restraint most suitable for a particular defendant in view of the attendant circumstances"].) While a trial court's discretionary order is presumed correct, and error must be affirmatively shown, nonetheless an abuse is demonstrated where the court's order appears to lack all evidentiary support in the record or is based on erroneous legal principles. (See *In re Cortez* (1971) 6 Cal.3d 78, 85–86, 98 Cal.Rptr. 307, 490 P.2d 819 ***370*** ["The term [judicial discretion] implies absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. [¶] To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision"].)

As early as 1871 the California Supreme Court recognized placing the criminal defendant in shackles " 'imposes physical burdens, pains and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense....' " (*People v. Duran, supra,* 16 Cal.3d at p. 288, 127 Cal.Rptr. 618, 545 P.2d 1322 (*Duran*), quoting *People v. Harrington* (1871) 42 Cal. 165, 168.)[9] In *Harrington* and later in *Duran* the Supreme Court recognized that shackling a criminal defendant prejudicially affects the defendant's constitutional right to be presumed innocent as well as the defendant's right to present and participate in the defense. (*People v. Duran, supra,* 16 Cal.3d at p. 290, 127 Cal.Rptr. 618, 545 P.2d 1322; *People v. Harrington, supra,* 42 Cal. at p. 168.)

The *Duran* court stated the potential harms resulting from shackling the: "possible prejudice in the minds of the jurors, the affront to human dignity,[10] the disrespect for the entire judicial system which is incident to unjustifiable use of physical restraints as well as the effect such restraints have upon a defendant's decision to take the stand, all support our continued adherence to the Harrington rule." (*Duran, supra,* at p. 290, 127 Cal.Rptr. 618, 545 P.2d 1322.) In addition, as the *Duran* court observed, the United States Supreme Court acknowledged that physical restraints should be used as a "last resort" not only because of the prejudice created in the juror's minds but also because "the use of this technique is itself something of an affront to the very dignity ***1356*** and decorum of judicial proceedings that the judge is seeking to uphold." (*Illinois v. Allen* (1970) 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353.)

Thus, the California Supreme Court stated in *Duran,* it had " 'reaffirm[ed] the rule that a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the *jury's presence,* unless there is a showing of a *manifest need* for such restraints.' " (*People v. Duran, supra,* 16 Cal.3d at pp. 290–291, 127 Cal.Rptr. 618, 545 P.2d 1322; italics added.) "Need" in this context was deemed to arise only when a defendant demonstrated through his or her conduct unruliness or an intent to escape, or engaged in other "nonconforming conduct or planned nonconforming conduct" that would disrupt the judicial process unless restraints were in place. (*Id.* at pp. 291–292, 127 Cal.Rptr. 618, 545 P.2d 1322.) The *Duran* court stated the nonconforming conduct must be shown on the record and the use of restraints without such a ***371*** record would constitute an abuse of discretion. (*Ibid.*) In fact, in *Duran* the Supreme Court concluded the trial court had abused its discretion in ordering the defendant shackled during the trial because no reasons appeared on the record. The *Duran* court noted that there was no showing the defendant threatened to escape or behaved violently before coming to court or while in court. The *Duran* court stated the fact of the defendant's status (as a state prison inmate charged with a violent crime) was insufficient to justify the use of restraints, holding the decision to shackle a defendant must be made on "a case-by-case basis" and cannot be based on a "general policy of imposing such restraints" upon those charged with violent crimes. (*Id.* at p. 293, 127 Cal.Rptr. 618, 545 P.2d 1322.)

While *Duran* involved shackling of a defendant during proceedings before a jury, the California courts subsequently considered whether the reasoning in *Duran* and *Harrington* applied to the use of restraints during other, nonjury criminal proceedings. In *Solomon v. Superior Court* (1981) 122 Cal.App.3d 532, 535, 177 Cal.Rptr. 1, Division Four of this District and ten years later, the California Supreme Court in *People v. Fierro* (1991) 1 Cal.4th 173, 219–220, 3 Cal.Rptr.2d 426, 821 P.2d 1302, considered the use of physical restraints upon defendants in the context of preliminary hearings. In both *Fierro* and *Solomon* the courts concluded the principles announced in *Duran* applied equally to court

proceedings other than jury trials. The *Fierro* court stated the rule of "evident necessity" "serves not merely to insulate the jury from prejudice, but to maintain the composure and dignity of the individual accused, and to preserve respect for the judicial system as a whole; these are paramount values to preserve irrespective of whether a jury is present during the proceeding." (*People v. Fierro, supra,* 1 Cal.4th at p. 220, 3 Cal.Rptr.2d 426, 821 P.2d 1302.) The *Fierro* court held that as at trial, shackling could not be used at a preliminary hearing absent "some showing" of necessity for their use. Nonetheless, the court also concluded "while the dangers of unwarranted shackling at the preliminary hearing are real, they are not as substantial as those presented during the trial. Therefore, a lesser showing than required at ***1357** trial is appropriate." (*Ibid.*) In *Fierro,* however, because no reasons for the shackling appeared in the trial court record, the Supreme Court did not have an opportunity to explain what constituted a sufficient "lesser showing."

Recently in *Deshaun M.* (2007) 148 Cal.App.4th 1384, 1386–87, 56 Cal.Rptr.3d 627, 629, the First District considered a challenge to the use of physical restraints on minor during a jurisdictional hearing in the juvenile delinquency proceeding. The court adopted the legal principles announced in *Fierro,* concluding: "[a]s in a preliminary hearing setting, however, while some showing of necessity for the use of physical restraints at a juvenile jurisdictional hearing should be required, it should not be as great as the showing required during a jury trial. '[W]hile the dangers of unwarranted shackling at the preliminary hearing are real, they are not as substantial as those presented during trial. Therefore, a lesser showing than that required at trial is appropriate.' (*Fierro,* supra, 1 Cal.4th at p. 220, 3 Cal.Rptr.2d 426, 821 P.2d 1302.) Similarly, while there are dangers in using unwarranted shackling at a juvenile hearing, they are not as substantial as those presented during a jury trial and a lesser showing should suffice." (*Deshaun M.,* supra, 148 Cal.App.4th at p. 1387, 56 Cal.Rptr.3d at p. 630.)

7 8 ****372** In addition, whatever the amount of "need" necessary, the burden is upon the People to establish it. (*People v. Prado* (1977) 67 Cal.App.3d 267, 277, 136 Cal.Rptr. 521.) Finally, the requirement that the record must show a "need" for shackles "also presupposes that it is the trial court, not law enforcement personnel, that must make the decision an accused be physically restrained in the courtroom. A trial court abuses its discretion if it abdicates this decision-making responsibility to security personnel or law enforcement." (*People v. Hill* (1998) 17 Cal.4th 800, 841, 72 Cal.Rptr.2d 656, 952 P.2d 673, fn. omitted.)

9 From this authority we glean several principles. First, the type of proceeding determines the amount of "need" that the court must find to justify the use of restraints. If the proceeding is before a jury, "manifest necessity" is clearly required. However, where the proceedings do not require a jury a "lesser showing" of need is apparently sufficient.

The second principle, of more paramount importance here, relates to the source of the "need." Every California State court that has considered the use of physical restraints in the courtroom, irrespective of the type of proceeding, has looked to the conduct of the individual defendant to determine the need for restraints. (See e.g., *People v. Cox* (1991) 53 Cal.3d 618, 280 Cal.Rptr. 692, 809 P.2d 351 [Supreme Court reaffirmed *Duran,* concluding that while no formal hearing is required to demonstrate need for shackles, the record ***1358** must contain substantiation of violence or threat of violence *by the accused;* a general policy to restrain all persons charged was not sufficient].) Indeed, in *Deshaun M.,* the court, citing *Duran* noted that "[a] court must not ... have a *general policy* of shackling *all defendants.*" (*Deshaun M.,* supra, 148 Cal.App.4th at p. 1387, 56 Cal.Rptr.3d at p. 629. [Italics added].) [11] In fact, because the juvenile court failed to make any findings concerning the necessity of using physical restraints on the minor for the jurisdictional hearing, the court of appeal found error and proceeded to examine whether Deshaun M. suffered prejudice. (*Ibid.*)

We note that no California State court case has endorsed the use of physical restraints based solely on the defendants' status in custody, [12] the lack of courtroom security personnel, or the inadequacy of the court facilities. In *Solomon,* for example, ****373** the court found an insufficient showing of need based on insufficient security personnel to secure the courtroom. The court observed the lower court record disclosed nothing more than the fact that there were two defendants charged with armed robbery in the courtroom at the same time during the preliminary hearing and that only one bailiff was present to guard them. The *Solomon* court observed that there was no evidence in the record to show that either defendant had posed a particular threat or had engaged in conduct warranting the use of restraints. The court noted, "if the magistrate believed that a single bailiff was insufficient to guard prisoners who had not yet shown 'nonconforming behavior,' his only recourse under the *Duran* standard was to send for more bailiffs." (*Solomon v. Superior Court, supra,* 122

Cal.App.3d p. 536, 177 Cal.Rptr. 1.)

In addition, in *Prado* the court found that the defendant had been improperly shackled when the only showing of necessity for the measure was the ***1359** existence of " 'inadequate facilities.' " (*People v. Prado, supra,* 67 Cal.App.3d at p. 275, 136 Cal.Rptr. 521.)

This authority and the legal principles emanating from it dispose of the bulk of the People and the Sheriff's Departments arguments before this court. Following Supreme Court authority—*Duran, Fierro, Cox* and *Hawkins* and the Court of Appeal in *Deshaun M.*—we conclude that any decision to shackle a minor who appears in the Juvenile Delinquency Court for a court proceeding must be based on the non-conforming conduct and behavior of that individual minor. Moreover, the decision to shackle a minor must be made on a case-by-case basis. In accord with *Duran* and *Fierro* the amount of need necessary to support the order will depend on the type of proceeding. However, the Juvenile Delinquency Court may not, as it did here, justify the use of shackles *solely* on the inadequacy of the courtroom facilities or the lack of available security personnel to monitor them. [13]

In arriving at this conclusion, we note that in *United States v. Howard* the Ninth Circuit reached a different result in a case where the district court adopted a general district-wide policy to shackle all in-custody defendants for their first appearances before the federal magistrate. In *Howard* the district court, after consultation with the U.S. Federal Marshal Service, implemented the policy to address security concerns associated with multi-defendant proceedings in an unsecured, large courtroom in the federal courthouse. (*United States v. Howard, supra,* 480 F.3d at p. 1008, 1013.) The Ninth Circuit concluded that the shackling policy was based on a legitimate government interest, was reasonably related to the security purpose and was the least restrictive and unobtrusive means to provide safety and security in the courtroom. (*Id.* at pp. 1012–1014.) In dicta the *Howard* court also suggested that requiring a trial court to make an "individualized determination" of need to use the restraints "may go farther than due process requires." (*Id.* at p. 1013.)

10 *Howard* does not bind this court. (*People v. Zapien* (1993) 4 Cal.4th 929, 989, 17 Cal.Rptr.2d 122, 846 P.2d 704, ["Decisions of the lower federal courts interpreting federal law, although persuasive, are not binding on state courts. [Citation.]"].) ****374** In any event, we find it contrary to California law. Indeed, *Howard* in part relies on authority from the Second Circuit, *United States v. Zuber* (2nd Cir.1997) 118 F.3d 101, 102–104, in which the court concluded that the rules limiting the use of shackles did not apply in ***1360** proceedings before a judge, in a non-jury setting. *Zuber* is contrary to *Fierro* and *Deshaun M.*

Furthermore, in contrast to the views expressed in *Howard,* we believe the potential harms resulting from an unjustified use of physical restraints relate directly to the constitutional values—the right to present a defense and the presumption of innocence—that the due process clause was intended to protect. Because these important values and others, including the integrity of the judicial system, are at stake, we conclude a court must make an individual determination of need for the use of physical restraints inside the courtroom.

In addition, *Howard* is distinguishable. First, in *Howard,* it appears it may not have been possible to conduct an individualized security-risk assessment of each defendant prior to his or her initial appearance in court. (*United States v. Howard, supra,* 480 F.3d at p. 1013 [a federal magistrate judge was quoted as observing "security-related information concerning defendants is typically incomplete" at time of the arraignment].) [14] There was no such showing in the matter before us.

Second, *Howard* concerns only *first* appearances. Here, however, this matter concerns the use of restraints at nearly *every* appearance in the Lancaster juvenile delinquency court. The petitioner, the People and the Sheriff's Department have taken all-or-nothing positions before this court—petitioner asserts shackles can never be used absent an individual showing of need while the People and the Sheriff's Department assert the use of shackles on every juvenile at nearly every proceeding is justified based on safety concerns arising from the design of the Lancaster courthouse and the lack of sufficient, available security personnel. Neither the People nor the Sheriff's Department have proposed that the general policy of using shackles be limited to initial court appearance as was the case in *Howard.*

Third, *Howard* involved proceedings where multiple defendants appeared in the courtroom at the same time. Here, however, this case involved a single individual. The issue of whether a different or lesser showing of need would ***1361** be required in cases involving multiple minors appearing at the same time during the court proceedings is not before this

court.[15]

Finally, in contrast to *Howard* this situation involves a minor, not an adult criminal defendant. The objectives of the juvenile justice system differ from those of the adult criminal justice system, and thus justify a less punitive approach to those who stand accused (and not yet to be found **375 criminally culpable) before the court. The United States Supreme Court has acknowledged the objectives of the juvenile justice system "are to provide measures of guidance and rehabilitation for the child ... not to fix criminal responsibility, guilt and punishment." (*Kent v. United States* (1966) 383 U.S. 541, 554, 86 S.Ct. 1045, 16 L.Ed.2d 84.)

Concomitantly, we also acknowledge, but ultimately reject the People's and the Sheriff's Department's contention that the *Duran–Feirro* line of reasoning should not apply because it arose in the context of criminal proceedings involving adults. The Attorney General apparently conceded this point and it was implicitly, and properly rejected, by the Court of Appeal in *Deshaun M.* (*Deshaun M.*, supra, 148 Cal.App.4th at p. 1388, 56 Cal.Rptr.3d at p. 630.) It is true juvenile delinquency proceedings are not "criminal proceedings." (Welf. & Inst.Code, § 203 ["An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in juvenile court be deemed a criminal proceeding."]; *Leroy T. v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 434, 438, 115 Cal.Rptr. 761, 525 P.2d 665.) Moreover, under California law juveniles do not have the same panoply of rights as adult criminal defendants. For example, juveniles do not have the right to a jury trial or to bail. (*Aubry v. Gadbois* (1975) 50 Cal.App.3d 470, 473–474, 123 Cal.Rptr. 365 [juvenile not entitled to bail]; *In re T.R.S.* (1969) 1 Cal.App.3d 178, 182, 81 Cal.Rptr. 574 [no right to jury trial in juvenile court].) Nonetheless, all juvenile proceedings must contain essentials of due process and fair treatment. In our view, the constitutional presumption of innocence, the right to present and participate in the defense, the interest in maintaining human dignity and the respect for the entire judicial system, are among these essentials whether the accused is 41 or 14. Moreover, the rationale of the California cases—that the Constitution does not require *1362 juveniles to have the full complement of rights afforded adult defendants because to do so would introduce a tone of criminality into juvenile proceedings—would not be served by requiring all juveniles, irrespective of the charges against them, or their conduct in custody, to wear shackles during all court proceedings. The use of shackles in a courtroom absent a case-by-case, individual showing of need creates the very tone of criminality juvenile proceedings were intended to avoid. (See *People v. Duran*, *supra*, 16 Cal.3d at p. 290, 127 Cal.Rptr. 618, 545 P.2d 1322 [the use of physical restraints in the courtroom is likely to cause those present to infer the accused is a violent person disposed to commit crimes].) Given the rehabilitative objectives of the juvenile justice system, we conclude a juvenile has the same right to an individual determination of need for the use of shackles as enjoyed by an adult criminal defendant. (See *Deshaun M.*, supra, 148 Cal.App.4th at p. 1387, 56 Cal.Rptr.3d at pp. 629–630.)

Neither the People nor the Sheriff's Department has offered any other sound justification for a blanket policy to shackle all minors in the juvenile delinquency court. In light of the rights as well as the potential harms at stake, none of the reasons offered—not inconvenience, the lack of security personnel or the inadequacy of the facilities warrants a different result. In *Solomon*, Division Four, in rejecting an effort to justify the use of restraints based on the lack of adequate courtroom security, stated that the viable alternatives to shackling included: "(1) ask for additional information which might justify physical restraint of the defendants, or (2) send for additional officers capable of maintaining security without handcuffing the defendants, **376 or (3) order the handcuffs removed." (*Solomon v. People*, *supra*, 122 Cal.App.3d at p. 536, 177 Cal.Rptr. 1.) Here the juvenile delinquency court has the similar options to obtain individual information about each minor[16] to support the order for shackles or send for an additional security without using restraints. While we are sympathetic to the obligations and responsibility our conclusion may impose upon the juvenile delinquency court,[17] the Sheriff's Department and the People, those pale in comparison to the values we uphold.

*1363 DISPOSITION

Let a writ of prohibition issue directing the respondent court to set-aside its prior general policy concerning the use of physical restraints in the courtroom on all minors during juvenile delinquency proceedings; and to henceforth consider any request for the use of physical restrains upon minors in the courtroom during court proceedings on an individual case-by-case basis in accord with the views expressed herein. Petitioner is entitled to recover her costs in this writ proceeding.

We concur: PERLUSS, P.J., and ZELON, J.

Parallel Citations

150 Cal.App.4th 1344, 07 Cal. Daily Op. Serv. 5600

Footnotes

1 Two other deputies are assigned to the detention area which houses in-custody minors and adults who have been brought to court for court appearances. Two other deputies are assigned to transport those in custody to and from the courtrooms, patrol the hallways and to provide additional security in the courtrooms as needed. The final deputy is assigned as a bailiff in the juvenile dependency courtroom.

2 Prior to October 2003, the building that now houses Department 285 was the old Antelope Valley Superior and Municipal Courthouse.

3 The Sheriff's Sergeant declared that in general only ankle restraints are used on the minors; that they are not usually handcuffed or restrained in any other manner. The Sheriff's Sergeant stated the ankle restraints allow the minor to walk but not run; that the restraints are lightweight and "fairly unobtrusive;" and that once the minor is seated at counsel table in the courtroom, so long as his or her feet remain under the table, the ankle restraints are not visible to the judge, witnesses or anyone else in the courtroom.

4 Neither below nor before this court does the petitioner challenge the practice of using physical restraints while transporting minors to and from the courtroom. Instead, petitioner's challenge centers on the use of such restraints only in the courtroom.

5 A petition for a writ relief is the appropriate means of obtaining review of court policies. (See *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 204 Cal.Rptr. 165, 682 P.2d 360.)

6 On January 1, 2007, the Judicial Council amended (nonsubstantively) and renumbered rule 22 as California Rules of Court, rule 8.252.

7 We also observe that petitioner urges this court not to consider the evidence presented by the People or the Sheriff because the evidence was not before the lower court when the court denied her request. Nonetheless, in her reply the petitioner has also submitted new evidence supportive of her position-a declaration from two law professors who stated the physical restraint policy at issue here is "anti-therapeutic for juveniles, prejudicial to their obtaining a fair trial, and antithetical to the rehabilitative aims of the juvenile justice system."

8 Until several months ago all of the California case law on the use of physical restraints concerned only adult criminal proceedings. However, recently the First District Court of Appeal in *In re Deshaun M.* (2007) 148 Cal.App.4th 1384, 1386–87, 56 Cal.Rptr.3d 627, 629, applied principles concerning the use of physical restraints on adult defendants in a juvenile delinquency case.

9 In 1872, the rule announced in *Harrington* was also recognized by the California Legislature with the enactment of section 13 of the Criminal Practice Act, and later recodified as Penal Code section 688, which provides "[n]o person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge."

10 The *Duran* court observed "[t]he removal of physical restraints is also desirable to assure that 'every defendant is brought before the court with the appearance, dignity, and self-respect of a free and innocent man.' " (*Duran, supra,* at p. 290, 127 Cal.Rptr. 618, 545 P.2d 1322.)

11 In contrast to the matter before us, there is no indication the juvenile delinquency court in *Deshaun M.* had adopted a courthouse policy of shackling on juveniles appearing in the courtroom.

12 In *People v. Hawkins* (1995) 10 Cal.4th 920, 42 Cal.Rptr.2d 636, 897 P.2d 574 (*Hawkins*), for example, the defendant was found to have been properly shackled when he had been involved in three fistfights in jail and had a

background of violent criminal activity. (*Id.* at pp. 943, 944, 42 Cal.Rptr.2d 636, 897 P.2d 574.) The defendant argued that shackling is justified only when a defendant disrupts courtroom proceedings or tries to escape from jail. (*Ibid.*) The *Hawkins* court stated there was no "such preconditions" on the trial court's discretion. (*Ibid.*) It observed, however, that neither a record of violence nor the fact that a defendant faced the death penalty was sufficient justification. (*Ibid.*) *Hawkins* held that the defendant's multiple instances of violent and nonconforming behavior in jail in addition to an extensive background of violent criminal conduct precluded a finding that the trial court had abused its discretion. (*Ibid.*) Thus, the Supreme Court has stated that the grounds for restraints need not be based necessarily on the conduct of the defendant at the time of trial, yet it has maintained that a record of violent criminal conduct combined with the potential punishment for the current charged offense are not sufficient to justify the defendant's shackling. (*Hawkins, supra*, 10 Cal.4th at p. 944, 42 Cal.Rptr.2d 636, 897 P.2d 574.)

13 This is not to say that the trial court must completely ignore courtroom or security conditions in making the determination of need. Instead, courtroom conditions and safety concerns cannot be the only consideration. Whatever role such circumstances may play in the analysis is slight and secondary in comparison to that played by the behavior and conduct of the individual juvenile.

14 In the original, now withdrawn, opinion in *Howard,* the Ninth Circuit quoted directly from the Chief Deputy Marshal's declaration, wherein he apparently declared: "It is not possible to conduct an individualized analysis of a defendant at the time of the initial appearance." (*United States v. Howard* (9th Cir.2006) 463 F.3d 999, 1002, *withdrawn by, United States v. Howard* (9th Cir.2007) 480 F.3d 1180.)

15 The California Supreme Court has affirmed the use of physical restraints in multi-defendant cases. (See *People v. Chacon* (1968) 69 Cal.2d 765, 778, 73 Cal.Rptr. 10, 447 P.2d 106 [court upheld use of restraints on Chacon and his two co-defendants where all three appeared in the courtroom at same hearing, all three were charged with in-prison assaults, had prior convictions for in-prison assaults, and one had a prior conviction for an escape attempt].)

16 There are no facts in the record to support a finding Tiffany A. posed a threat of violence or nonconforming conduct in the courtroom. There was no evidence she acted unruly during any of the prior court proceedings. Nor was there evidence she was plotting an escape or planning to disrupt future proceedings if unrestrained. The record contains no showing of violence or a threat of violence or other nonconforming conduct. Absent such a showing, the imposition of such obvious physical restraints was improper, under *Duran* and *Feirro*. Thus, we conclude that the imposition of shackles in this case runs afoul of California Supreme Court authority that restraints can only be ordered when there is a need based on the conduct of the accused.

17 The court has a statutory duty to provide adequate quarters and facilities for court proceedings. (Code Civ. Proc., § 144; *People v. Zammora* (1944) 66 Cal.App.2d 166, 235, 152 P.2d 180.)

End of Document © 2014 Thomson Reuters. No claim to original U.S. Government Works.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2007

SESSION LAW 2007-100
HOUSE BILL 1243

AN ACT TO CREATE A PROCEDURE BY WHICH DETERMINATION IS MADE TO RESTRAIN JUVENILES IN THE COURTROOM.

The General Assembly of North Carolina enacts:

SECTION 1. Article 24 of Chapter 7B of the General Statutes is amended by adding a new section to read:

"**§ 7B-2402.1. Restraint of juveniles in courtroom.**

At any hearing authorized or required by this Subchapter, the judge may subject a juvenile to physical restraint in the courtroom only when the judge finds the restraint to be reasonably necessary to maintain order, prevent the juvenile's escape, or provide for the safety of the courtroom. Whenever practical, the judge shall provide the juvenile and the juvenile's attorney an opportunity to be heard to contest the use of restraints before the judge orders the use of restraints. If restraints are ordered, the judge shall make findings of fact in support of the order."

SECTION 2. This act becomes effective October 1, 2007, and applies to all hearings conducted on or after that date.

In the General Assembly read three times and ratified this the 14th day of June, 2007.

s/ Beverly E. Perdue
President of the Senate

s/ Joe Hackney
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 7:18 p.m. this 20th day of June, 2007

Analysis
As of: May 30, 2011

IN RE: AMENDMENTS TO THE FLORIDA RULES OF JUVENILE PROCEDURE.

No. SC09-141

SUPREME COURT OF FLORIDA

26 So. 3d 552; 2009 Fla. LEXIS 2066; 34 Fla. L. Weekly S 671

December 17, 2009, Decided

SUBSEQUENT HISTORY: Related proceeding at *In re Amendments to Fla. Rule of Juvenile Procedure 8.010, 2010 Fla. LEXIS 1934 (Fla., Nov. 10, 2010)*

COUNSEL: [**1] Charles Hugh Davis, Chair, Juvenile Court Rules Committee, Fourth Judicial Circuit, Jacksonville, Florida, and David N. Silverstein, Past Chair, Tampa, Florida, and Robert W. Mason, Past Chair, Jacksonville, Florida; and John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, Florida, for Petitioners.

Carlos J. Martinez, Public Defender, Andrew Stanton, and Shannon Patricia McKenna, Assistant Public Defenders, Eleventh Judicial Circuit, Miami, Florida, on behalf of Florida Public Defender Association; Robin L. Rosenberg, Florida Children's First, Coral Springs, Florida; Michael Ufferman, The Florida Association of Criminal Defense Lawyers, Tallahassee, Florida; Bernard P. Perlmutter and Mia F. Goldhagen, University of Miami School of Law Children and Youth Law Clinic, Miami, Florida; Stephen J. Schnably and Irwin P. Stotzky, Coral Gables, Florida, on behalf of University of Miami School of Law Center for the Study of Human Rights; Anthony C. Musto, Special Counsel, Hallandale Beach, Florida and Jeffrey Dana Gillen, Statewide Appeals Director, West Palm Beach, Florida, on behalf of Florida Department of Children and Families; Judge Raymond O. Gross, Sixth Judicial Circuit, Clearwater, Florida and B. Elaine [**2] New, Court Counsel, Sixth Judicial Circuit, St. Petersburg, Florida; Helen Beth Lastinger, and Robert A. Gualtieri, Largo, Florida, on behalf of Jim Coats, Sheriff, Pinellas County, Florida; Eric Trombley, Assistant State Attorney, Second Judicial Circuit, Tallahassee, Florida; Jack A. Moring, Chair, Family Law Rules Committee, Fort Lauderdale, Florida; Responding with Comments.

JUDGES: QUINCE, C.J., and PARIENTE, LEWIS, POLSTON, LABARGA, and PERRY, JJ., concur. CANADY, J., concurs in part and dissents in part with an opinion.

OPINION

[*553] Original Proceeding -- Florida Rules of Juvenile Procedure Committee

PER CURIAM.

We have for consideration the regular cycle report of

proposed rule amendments filed by The Florida Bar's Juvenile Court Rules Committee. We have jurisdiction. *See art. V, § 2(a), Fla. Const.*; *Fla. R. Jud. Admin. 2.140(b).*

BACKGROUND

The Juvenile Court Rules Committee (Committee) has filed its regular cycle report proposing amendments to the following rules: *8.010* (Detention Hearing); *8.070* (Arraignments); *8.080* (Acceptance of Guilty or Nolo Contendere Plea); *8.100* (General Provisions for Hearings); *8.115* (Disposition Hearing); *8.130* (Motion for Rehearing); *8.225* (Process, Diligent Searches, and [**3] Service of Pleadings and Papers); *8.235* (Motions); *8.257* (General Magistrates); *8.265* (Motion for Rehearing); *8.310* (Dependency Petitions); *8.400* (Case Plan Development); *8.410* (Approval of Case Plans); and *8.505* (Process and Service). The Committee also proposes new forms *8.982* (Notice of Action for Advisory Hearing) and 8.978(a) (Order Concerning Youth's Eligibility for Florida's Tuition and Fee Exemption). [1] A number of the Committee's proposals are in response to the recommendations of the National Juvenile Defender Center (NJDC) in its 2006 report entitled *Florida: An Assessment of Access to Counsel & Quality of Representation in Delinquency Proceedings.* [2] This assessment contained ten [*554] "Core Recommendations" addressing various areas targeted by the NJDC for improvement. [3] The Court requested the Committee's input on all aspects of the report and specifically sought the Committee's advice as to whether rule amendments were warranted in response to several of the NJDC's recommendations. In its report, the Committee proposes various amendments to *rules 8.010*, *8.070*, *8.080*, *8.100*, and *8.115* in response to the NJDC's recommendations. Several other amendments addressing other matters [**4] are also proposed. The proposed amendments were published for comment by the Committee and were reviewed and approved by the Board of Governors of The Florida Bar.

1 The Committee's report also responds to the Court's request that it consider the issue of the appropriate procedure to raise an ineffective assistance of counsel claim in termination of parental rights cases. The Committee does not present any proposal on this issue and states that after consideration and discussion, it feels that the issue is outside the scope of its purview. This "no action" response has been severed from this case and is being addressed separately.

2 Patricia Puritz & Cathryn Crawford, *Florida: An Assessment of Access to Counsel & Quality of Representation in Delinquency Proceedings* (2006) (on file with National Juvenile Defender Center), *available at* http://www.njdc.info/pdf/Florida%20Assessment.pdf.

3 The Core Recommendations were as follows:

> 1. State legislators and local policymakers should increase the resources that are available to improve delinquency representation in juvenile court. Those resources should include support for attorneys and non-lawyers with special expertise in case planning and representation [**5] and other necessary support staff.
>
> 2. The elected Public Defenders should ensure that youth are competently represented by defense counsel at all court hearings and throughout the entire delinquency process.
>
> 3. Further restrictions on waiver of counsel must be established consistent with national standards. Youth should not be permitted to waive counsel without prior consultation with such counsel. Counsel should assist the client in making an informed, knowing and voluntary choice and stand-by counsel should be available in the event of waiver. It is imperative that youth understand the long term consequences of a juvenile adjudication.
>
> 4. Judicial colloquies and admonitions administered to youth must be thorough, comprehensive and easily understood. Judges should take the time to fully test a

youth's understanding.

5. A comprehensive review of indigence determinations and other fees assessed in juvenile court should be undertaken. The lack of consistency and uniformity is glaring. These costs and fees are punitive in nature and place an undue burden on youth.

6. State legislators, local policymakers, and juvenile court judges should end the practice of shackling youth by hand, foot and [**6] belly chain for court appearances unless an extenuating individual situation warrants such restraint. Under any circumstance, the practice of shackling youth to each other in a group or to fixed objects in the courtroom should be strictly prohibited.

7. The quality of representation in juvenile court should be improved through early appointment of counsel, reduced defender caseloads, additional lawyer training and adequate supervision and monitoring of cases in juvenile court. The Florida Public Defender Association should develop the capacity to monitor and improve the delivery of juvenile defense services to comply with these recommendations.

8. Florida should establish a minimum age for juvenile court jurisdiction and children under twelve should be diverted from juvenile court. Young children under twelve should never be handcuffed or booked in the same manner as older youth.

9. Local courts, law schools or bar associations should routinely collect data on defense representation in juvenile court to identify and address systemic weaknesses.

10. Plea agreements should never be taken at arraignment in juvenile court. Defense counsel must have a meaningful opportunity to consult with [**7] the youth, explain potential short- and long-term consequences of a conviction, and review the sufficiency of the case prior to the court accepting a plea agreement.

Id. at 66-67.

After submission to the Court, the Committee's proposals were again published for comment. Several comments and requests for oral argument were filed by various parties. Most of the comments concerned the proposed amendment to *rule 8.100* (General Provisions for Hearings), [*555] which would restrict the use of restraints on juveniles during court hearings. This amendment drew substantial comment, both for and against the proposal. The University of Miami School of Law Center for the Study of Human Rights, the University of Miami School of Law Children and Youth Law Clinic, the Florida Public Defender Association, Florida Children's First, and the Florida Association of Criminal Defense Lawyers filed comments in favor of the proposed amendment. The Office of the State Attorney for the Second Judicial Circuit, the Sheriff of Pinellas County, and the Chief Judge of the Sixth Judicial Circuit filed comments in opposition to the proposed amendment. Substantive comments also were filed by the Department of Children and [**8] Families with regard to the proposed amendments to *rules 8.225*, *8.235*, *8.257*, *8.265*, and *8.310*. Oral argument was heard in this case on June 4, 2009.

AMENDMENTS

Upon consideration of the Committee's report, the comments and responses thereto, and the presentations of the interested parties at oral argument, we amend the Florida Rules of Juvenile Procedure as further explained below. [4]

4 We reject only one of the Committee's proposals, the amendments to *rule 8.225* (Process,

> Diligent Searches, and Service of Pleadings), that would eliminate the use of mail to serve summonses and other process on persons residing out of state. We agree with the comments of the Department of Children and Families that the proposal would not achieve its stated objective of achieving consistency in the manner of service and ignores the practical considerations of serving out of state residents.

As discussed, several rule amendments were proposed by the Committee in response to the recommendations of the NJDC. Provisions are added to *rules 8.010* (Detention Hearing) and *8.070* (Arraignment) requiring appointment of counsel at the detention hearing and at arraignment, respectively. This is in response to the NJDC's [**9] recommendation that "the quality of representation in juvenile court should be improved through early appointment of counsel." [5] *Rule 8.080* (Acceptance of Guilty or Nolo Contendere Plea) is amended in response to the NJDC's recommendation that "[j]udicial colloquies and admonitions administered to youth must be thorough, comprehensive, and easily understood" and that "[j]udges should take time to fully test a youth's understanding," and its recommendations regarding waiver of counsel and early appointment of counsel. [6] The amended rule expressly requires a judge to determine that a child understands an enumerated list of rights and consequences of entering a guilty or nolo contendere plea and understands that he or she has a "right to be represented by an attorney at every stage of the proceedings, and if necessary, one will be appointed." [7]

> 5 Puritz & Crawford, *supra* note 4, at 66.
>
> 6 *Id.*
>
> 7 Other minor amendments are also made to *rules 8.010*, *8.070*, and *8.080*. *Rule 8.010* is amended to conform to the statutory requirement that a detained child be given a hearing within twenty-four hours of being detained; *rules 8.070* and *8.080* are amended conform them to their counterpart adult criminal *rule 3.172*.

As [**10] noted above, most of the comments filed in this case addressed the Committee's proposed amendment to *rule 8.100* (General Provisions for Hearings) restricting the use of restraints on juveniles during court appearances. The proposed amendment adds a new subdivision (b) to this rule providing that restraints, such as handcuffs, chains, irons, or straightjackets may not be used during juvenile court [*556] appearances unless the court finds that the use of restraints is necessary, based on enumerated factors, and there are no less restrictive alternatives to restraint. This proposal is in response to a specific recommendation by the NJDC that restraints should not be used on children during juvenile court appearances unless extenuating circumstances warrant it. [8] As to the use of restraints in Florida's courtrooms, the NJDC's assessment stated that during its assessment observations,

> The frequent and liberal use of restraints on youth in Florida courtrooms was disconcerting. Observers found that wrist and leg shackles with belly chains appear to be the norm in many juvenile courtrooms across the state. Without exception, every courtroom visited had youth, including very young children, fully [**11] shackled when they were brought from detention into the courthouse. These shackles remained on when the youth were brought into the courtroom itself. [9]

Additionally, the assessment noted that "[y]outh in Florida's courts were also typically shackled together in a group," and that "[i]n several courtrooms, observers saw youth who were brought into courtrooms in wrist and leg shackles and then were further chained to furniture, doors or other fixed structures in the courtroom to keep them in place." [10] The assessment identified these practices as one of the barriers to just and balanced outcomes that exist in Florida's juvenile courts. The NJDC's recommendation 6 stated as follows:

> State legislators, local policymakers, and juvenile court judges should end the practice of shackling youth by hand, foot and belly chain for court appearances unless an extenuating individual situation warrants such restraint. Under any circumstance, the practice of shackling youth to each other in a group or to fixed objects in the courtroom should be strictly prohibited. [11]

Further, in its more specific implementation strategies, the NJDC recommended that the judiciary should "[p]rohibit the generalized policy [**12] of allowing

youth to appear in juvenile court in shackles or handcuffs unless extenuating circumstances warrant such restraint in individual cases" and "[e]nd, without exception, the practice of shackling youth to fixed objects or structures during transportation and in court." [12]

8 Puritz & Crawford, *supra* note 4, at 66.
9 *Id.* at 57.
10 *Id.* at 57-58.
11 *Id.* at 66.
12 *Id.* at 69.

We find the indiscriminate shackling of children in Florida courtrooms as described in the NJDC's Assessment repugnant, degrading, humiliating, and contrary to the stated primary purposes of the juvenile justice system and to the principles of therapeutic justice, a concept which this Court has previously acknowledged. *See In re Report of Family Court Steering Committee, 794 So. 2d 518, 523 (Fla. 2001)* (approving guiding principles for family court, including that "therapeutic justice" should be a key part of the family court process). We also recognize, without deciding, that indiscriminate use of restraints on children in the courtroom in juvenile delinquency proceedings may violate the children's due process rights and infringe on their right to counsel. We agree with the proponents of this amendment that the presumption [**13] should be that children are not restrained when appearing in court and that restraints may be used only upon [*557] an individualized determination that such restraint is necessary. Accordingly, we amend *rule 8.100* as proposed by the Committee.

Next, *rule 8.115* (Disposition Hearing) is amended to specifically provide, in new subdivision (b), that counsel be appointed at disposition hearings. This is in response to the NJDC's recommendation that youth should be represented at all court hearings and throughout the entire delinquency process. It also conforms to *section 985.033(1), Florida Statutes* (2008), which requires that a child be represented at all stages of the delinquency proceeding unless counsel is waived. The Committee also recommended that *rule 8.115* be amended to require that a disposition order "give[] credit for time served in secure detention before disposition." This is in response to the Court's referral of an issue regarding such credit in *J.I.S. v. State, 930 So. 2d 587 (Fla. 2006)*. In that case, the Court held that juveniles whose dispositions are to determinate commitment programs must be granted credit for time served in secure detention, but those whose dispositions [**14] are to indeterminate commitment programs are not entitled to such credit. *Id. at 596*. The Court also addressed the question of whether a commitment order should specify the amount of predisposition time served, even on an indeterminate commitment on which there is no right to credit for the time served. *Id. at 596-97*. The Court noted that such a notation may be beneficial if the original commitment is later reduced and may be helpful to the Department of Juvenile Justice in structuring a commitment or postrelease program or determining when the juvenile offender has completed a program. *Id.* Thus, the Court referred the matter to the Committee "to determine whether we should adopt a rule requiring the notation [of predisposition time served in secure detention] on all residential commitment orders." *Id. at 597*. Because, as explained in *J.I.S.*, entitlement to credit for time served in secure detention prior to commitment is dependent upon whether the commitment is determinate or indeterminate and, thus, not all disposition orders must necessarily grant credit for such time, we modify the language of the proposed amendment to require that a disposition order "specify" the amount of time [**15] served in secure detention before disposition.

Rule 8.130 (Motion for Rehearing), applicable in delinquency cases, and *rule 8.265* (Motion for Rehearing), applicable in dependency and termination of parental rights cases, are each amended, although in different ways, to remedy the fact that under the current rules, a motion for rehearing does not toll the time for taking an appeal in juvenile proceedings and, thus, litigants may be forced to abandon such motions if they are not ruled upon before the thirty-day time period to seek an appeal expires. In order to address this problem, *rule 8.130(b)(3)* is amended to provide that a motion for rehearing shall toll the time for taking an appeal. *Rule 8.265* is amended to state that the court must rule on a motion for rehearing within ten days or it is deemed denied. We agree with the Committee that these changes strike the appropriate balance in each situation.

Rules 8.235 (Motions) and *8.310* (Dependency Petitions) are amended to clarify and account for the possibility of the dismissal of only certain allegations in a dependency petition, as opposed to the entire petition. [13] The current rules address only [*558] the dismissal of the entire petition, [**16] and the Committee advises that under current practice, fewer than all of the

allegations in a petition may be dismissed. This amendment is intended simply to reflect the current practice that is not specifically provided for in the rules.

> 13 In response to comments made by the Department of Children and Families (DCF), the Committee suggested and we adopt a modified version of these amendments. The language originally proposed by the Committee spoke in terms of "allegations in the petition against a particular party." DCF objected to this language on the basis that allegations in a dependency petition are not "against" any particular party, but rather are allegations that a child is dependent. The Committee agrees and recognizes that a parent is always a party to a dependency action even if there are no allegations which pertain to that parent. *See C.L.R. v. Dep't of Children & Families, 913 So. 2d 764 (Fla. 5th DCA 2005)* (demonstrating need for clarification that parent remains a party to dependency action even where no allegations pertain to that parent, where father as to whom DCF dismissed allegations was not given notice of subsequent hearings or allowed discovery). Thus, the Committee [**17] suggested deleting reference to allegations "against a particular party," and we adopt the amendments with that modification.

Next, *rule 8.257* currently requires a party to provide a transcript when moving for exceptions to the general magistrate's report. *Subdivisions (b)(3)(A), (e)(2),* and (g) of this rule are amended to allow a party to provide a either a transcript, an "electronic recording of proceedings," or a "stipulation by the parties of the evidence considered" by the magistrate. This is intended to save costs and reduce delay in the resolution of the exceptions and entry of the final order. In adopting this amendment, however, we wish to emphasize that allowing use of an electronic recording or stipulation in lieu of a written transcript for this limited purpose is not intended in any way to alter the definition of the "official record" of a proceeding, which is the written transcript prepared in accordance with *Florida Rule of Judicial Administration 2.535(f). See Fla. R. Jud. Admin. 2.535(a)(6)* (defining "official record").

Next, *section 39.6011, Florida Statutes* (2008), requires the Department of Children and Families to develop and file with the court a case plan for each [**18] child receiving services. In accordance with this requirement, *rule 8.400* (Case Plan Development) is amended to require that a case plan be filed and served on the parties three business days before a disposition or case plan review hearing. Additionally, *rule 8.410* (Approval of Case Plans) is amended to require the court to review the contents of the case plan at the disposition or case plan review hearing.

Rule 8.505 governs process and service of process in termination of parental rights proceedings, including constructive service. Subdivision 8.505(c) is amended to provide that a notice of action for service by publication shall contain only the initials of the child, the child's date of birth, and the full name and last known address of the person subject to the notice. This amendment further clarifies that the notice shall not contain any other identifying information about the child and shall not contain the name or any other identifying information of the other parent or prospective parents who are not the subject of the notice. This is intended to prevent the publication of confidential information. Additionally, new form *8.982* (Notice of Action for Advisory Hearing) is adopted [**19] in accord with the requirements of amended *rule 8.505.*

Finally, *section 1009.25(2)(c), Florida Statutes* (2008), provides a tuition and fees exemption, under certain circumstances, for students in DCF's or a relative's custody when they turn eighteen or who were adopted from DCF or placed in a guardianship after spending at least six months in DCF custody after turning sixteen. [*559] New form 8.978(a) (Order Concerning Youth's Eligibility for Florida's Tuition and Fee Exemption) is adopted to provide a form order to be entered by a court certifying a youth's eligibility for this tuition and fee exemption.

CONCLUSION

Accordingly, the Florida Rules of Juvenile Procedure are hereby amended as set forth in the appendix to this opinion. New language is underscored; deleted language is struck through. The amendments shall become effective on January 1, 2010, at 12:01 a.m.

It is so ordered.

QUINCE, C.J., and PARIENTE, LEWIS, POLSTON, LABARGA, and PERRY, JJ., concur.

CANADY, J., concurs in part and dissents in part with an opinion.

CONCUR BY: CANADY (In Part)

DISSENT BY: CANADY (In Part)

DISSENT

CANADY, J., concurring in part and dissenting in part.

I concur with the majority's decision to adopt amendments to *Florida Rules of Juvenile Procedure 8.010, 8.070, 8.080, 8.115, 8.130, 8.235, 8.257, 8.265, 8.310, 8.400, 8.410,* and *8.505.* I dissent, however, from the majority's decision to amend *rule 8.100.* Although I agree that juveniles should not be chained to one another in the courtroom or restrained in any other way that would interfere with their ability to have meaningful access to counsel, I dissent from the majority's adoption of a rule establishing a blanket presumption against the use of any kind of restraints on juveniles appearing before a trial judge. In my view, the rule unduly restricts the ability of juvenile court judges to ensure that security is maintained in the courtroom.

It is true that the use of physical restraints during court proceedings may violate the defendant's due process rights. *See Deck v. Missouri, 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005); Hernandez v. State, 4 So. 3d 642 (Fla.), cert. denied, 130 S. Ct. 160, 175 L. Ed. 2d 101 (2009).* Aside from the use of restraints that impede a defendant's ability freely to consult with counsel, however, the due process concerns come into play only when a restrained defendant appears before a *jury.* The common law rule underlying the due process right "did not apply at 'the time of arraignment,' or like proceedings before the judge." *Deck, 544 U.S. at 626* (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 317 (1769)). The common law rule "was meant to protect defendants appearing at trial before a jury." *Id.* The core due process concern that "[v]isible shackling undermines the presumption of innocence and the related fairness of the factfinding process" has no application to nonjury proceedings. *Id. at 630.* Accordingly, due process considerations do not justify the broad rule adopted by the majority.

The minority report from the Juvenile Court Rules Committee states:

> Control of courtroom security and the safety of those present in the courtroom are matters that should remain within the sound discretion of the trial judge. Given the wide variations in courtroom facilities across the state and differing availability of security staff, it is a matter of necessity that the trial judge retains full authority over the security of his or her courtroom, to protect the safety of all persons present.
>
> . . . .
>
> . . . It is the juvenile judge who can best take into consideration the safety of all present, and who should continue to do so, without the imposition of rules [*560] more appropriate to adult defendants in the presence of a jury.

I am persuaded by the view articulated in the minority's report.

In his written comments filed on behalf of the Sixth Judicial Circuit in opposition to the proposed amendment to *rule 8.100,* Judge Raymond Gross points out that the "juveniles held in detention have already been determined to be high risk" by Department of Juvenile Justice personnel. I also find this point to be significant. In light of this point, it seems unwarranted to impose a presumption against the use of any restraints. I am concerned that by imposing such a presumption against the use of restraints on juveniles who have been placed in detention, the new rule will unduly hamper the trial court's ability to maintain the safety of court personnel, the juveniles themselves, and any bystanders in the courtroom.

The reality is that being subjected to physical restraints is an inherent part of being in custody. Juveniles who are in custody will routinely be subjected to restraints when they are transported to and from court. Nothing in the proposed rule alters that fact. Accordingly, any "therapeutic" impact of the rule will be insubstantial compared with the significant security risks that may arise from the implementation of the rule.

Because I conclude that revised *rule 8.100* may interfere with the State's interest in conducting safe, orderly court proceedings, I dissent from the majority's

revision of *rule 8.100*.

APPENDIX

RULE 8.010. DETENTION HEARING

(a) [No Change]

[EDITOR'S NOTE: TEXT IN ITALICS IS UNDERLINED IN THE SOURCE.]

(b) Time. The detention hearing shall be held within the time [**20] limits as provided by law. *A child who is detained shall be given a hearing within 24 hours after being taken into custody.*

(c) - (d) [No Change]

(e) Appointment of Counsel. At the detention hearing, the child shall be advised of the right to be represented by counsel. Counsel shall be appointed if the child qualifies, unless the child waives counsel in writing subject to the requirements of rule 8.165.

[EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [O> <O] IS OVERSTRUCK IN THE SOURCE.]

([O>e<O]*f*) Advice of Rights. At the detention hearing the persons present shall be advised of the purpose of the hearing and the child shall be advised of:

(1) the nature of the charge for which he or she was taken into custody;

[O>(2) the right to be represented by counsel and if insolvent the right to appointed counsel;<O]

([O>3<O]*2*) that the child is not required to say anything and that anything said may be used against him or her;

([O>4<O]*3*) if the child's parent, custodian, or counsel is not present, that he or she has a right to communicate with them and that, if necessary, reasonable means will be provided to do so; and

([O>5<O]*4*) the reason continued detention is requested.

([O>f<O]*g*) Issues. At this hearing the court [**21] shall determine the following:

(1) The existence of probable cause to believe the child has committed a delinquent act. This issue shall be determined in a nonadversary proceeding. The court shall apply the standard of proof necessary for an arrest warrant and its finding may be based upon a sworn complaint, affidavit, deposition under oath, or, if necessary, upon testimony under oath properly recorded.

(2) The need for detention according to the criteria provided by law. In making [*561] this determination in addition to the sworn testimony of available witnesses all relevant and material evidence helpful in determining the specific issue, including oral and written reports, may be relied upon to the extent of its probative value, even though it would not be competent at an adjudicatory hearing.

(3) The need to release the juvenile from detention and return the child to the child's nonresidential commitment program.

([O>g<O]*h*) Probable Cause. If the court finds that such probable cause exists, it shall enter an order making such a finding and may, if other statutory needs of detention exist, retain the child in detention. If the court finds that such probable cause does not exist, it shall [**22] forthwith release the child from detention. If the court finds that one or more of the statutory needs of detention exists, but is unable to make a finding on the existence of probable cause, it may retain the child in detention and continue the hearing for the purpose of determining the existence of probable cause to a time within 72 hours of the time the child was taken into custody. The court may, on a showing of good cause, continue the hearing a second time for not more than 24 hours beyond the 72-hour period. Release of the child based on no probable cause existing shall not prohibit the filing of a petition and further proceedings thereunder, but shall prohibit holding the child in detention prior to an adjudicatory hearing.

RULE 8.070. ARRAIGNMENTS

(a) Appointment of Counsel. Prior to the adjudicatory hearing, the court may conduct a hearing to determine whether a guilty, nolo contendere, or not guilty plea to the petition shall be entered and whether the child is represented by counsel or entitled to appointed counsel as provided by law. *Counsel shall be appointed if the child qualifies for such appointment and does not waive counsel in writing subject to the requirements of* [**23]

rule 8.165.

(b) Plea. The reading or statement as to the charge or charges may be waived by the child. If the child is represented by counsel, counsel may file a written plea of not guilty at or before arraignment and arraignment shall then be deemed waived. If a plea of guilty or nolo contendere is entered, the court shall proceed as set forth under *rule 8.115*, disposition hearings. If a plea of not guilty is entered, the court shall set an adjudicatory hearing within the period of time provided by law [O>and appoint counsel when required. If the child is represented by counsel, counsel may file a written plea of not guilty at or before arraignment and thereupon arraignment shall be deemed waived.<O] *The child is entitled to a reasonable time in which to prepare for trial.*

Committee Notes

[No Change]

RULE 8.080. ACCEPTANCE OF GUILTY OR NOLO CONTENDERE PLEA

(a) [No Change]

(b) Determination by Court. The court, when making this determination, should place the child under oath and shall address the child personally. The court shall determine that the child understands *each of* the following *rights and consequences of entering a guilty or nolo contendere plea*:

(1) The nature of the charge to [**24] which the plea is offered and the possible dispositions available to the court.

(2) If the child is not represented by an attorney, that the child has the right to be represented by an attorney at every stage of the proceedings and, if necessary, [*562] one will be appointed. *Counsel shall be appointed if the child qualifies for such appointment and does not waive counsel in writing subject to the requirements of rule 8.165.*

(3) That the child has the right to plead not guilty, or to persist in that plea if it had already been made, and that the child has the right to an adjudicatory hearing and at that hearing has the right to the assistance of counsel, the right to compel the attendance of witnesses on his or her behalf, the right to confront and cross-examine witnesses against him or her, and the right not to be compelled to incriminate himself or herself.

(4) That, if the child pleads guilty or nolo contendere, without express reservation of the right to appeal, the right to appeal all matters relating to the judgment, including the issue of guilt or innocence, is relinquished, but the right to review by appropriate collateral attack is not impaired.

(5) That, if the child pleads guilty [**25] or nolo contendere, there will not be a further adjudicatory hearing of any kind, so that by pleading so the right to an adjudicatory hearing is waived.

(6) That, if the child pleads guilty or nolo contendere, the court may ask the child questions about the offense to which the child has pleaded, and, if those questions are answered under oath, on the record, the answers may later be used against the child in a prosecution for perjury.

(7) The complete terms of any plea agreement including specifically all obligations the child will incur as a result.

(8) That, if the child pleads guilty or nolo contendere, and the offense to which the child is pleading is a sexually violent offense or a sexually motivated offense, or if the child has been previously adjudicated for such an offense, the plea may subject the child to involuntary civil commitment as a sexually violent predator on completion of his or her sentence. It shall not be necessary for the trial judge to determine whether the present or prior offenses were sexually motivated, as this admonition shall be given to all children in all cases.

(c) - (e) [No Change]

(f) Withdrawal of Plea When Judge Does Not Concur. *If the trial judge* [**26] *does not concur in a tendered plea of guilty or nolo contendere arising from negotiations, the plea may be withdrawn.*

([O>f<O]g) Failure to Follow Procedures. Failure to follow any of the procedures in this rule shall not render a plea void, absent a showing of prejudice.

RULE 8.100. GENERAL PROVISIONS FOR HEARINGS

Unless otherwise provided, the following provisions apply to all hearings:

(a) [No Change]

(b) Use of Restraints on the Child. Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, may not be used on a child during a court proceeding and must be removed prior to the child's appearance before the court unless the court finds both that:

(1) The use of restraints is necessary due to one of the following factors:

(A) Instruments of restraint are necessary to prevent physical harm to the child or another person;

(B) The child has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior; or

[*563] *(C) There is a founded belief that the child presents a substantial risk of flight from the courtroom; and*

(2) [**27] *There are no less restrictive alternatives to restraints that will prevent flight or physical harm to the child or another person, including, but not limited to, the presence of court personnel, law enforcement officers, or bailiffs.*

(]O>b<O[*c*) **Absence of the Child.** If the child is present at the beginning of a hearing and during the progress of the hearing voluntarily absents himself or herself from the presence of the court without leave of the court, or is removed from the presence of the court because of disruptive conduct during the hearing, the hearing shall not be postponed or delayed, but shall proceed in all respects as if the child were present in court at all times.

(]O>c<O[*d*) **Invoking the Rule.** Prior to the examination of any witness the court may, and on the request of any party in an adjudicatory hearing shall, exclude all other witnesses. The court may cause witnesses to be kept separate and to be prevented from communicating with each other until all are examined.

(]O>d<O[*e*) **Continuances.** The court may grant a continuance before or during a hearing for good cause shown by any party.

(]O>e<O[*f*) **Record of Testimony.** A record of the testimony in all hearings shall be made by an [**28] official court reporter, a court approved stenographer, or a recording device. The records shall be preserved for 5 years from the date of the hearing. Official records of testimony shall be provided only on request of a party or a party's attorney or on a court order.

(]O>f<O[*g*) **Notice.** When these rules do not require a specific notice, all parties will be given reasonable notice of any hearing.

RULE 8.115. **DISPOSITION HEARING**

(a) [No Change]

(b) Appointment of Counsel. Counsel shall be appointed at all disposition hearings, including cases transferred from other counties and restitution hearings, if the child qualifies for such appointment and does not waive counsel in writing as required by rule 8.165.

(]O>b<O[*c*) **Disclosure.** The child, the child's attorney, the child's parent or custodian, and the state attorney shall be entitled to disclosure of all information in the predisposition report and all reports and evaluations used by the department in the preparation of the report.

(]O>c<O[*d*) **Disposition Order.** The disposition order shall be prepared and distributed by the clerk of the court. Copies shall be provided to the child, defense attorney, state attorney, and department representative. [**29] Each case requires a separate disposition order. The order shall:

(1) state the name and age of the child;

(2) state the disposition of each count, specifying the charge title, degree of offense, and maximum penalty defined by statute *and specifying the amount of time served in secure detention before disposition*;

(3) state general and specific conditions or sanctions;

(4) make all findings of fact required by law;

(5) state the date and time when issued and the county and court where issued; and

(6) be signed by the court with the title of office.

LexisNexis Florida Rules of Court Annotated
Copyright 2011 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** RULES CURRENT THROUGH CHANGES RECEIVED BY April 15, 2011 ***
*** ANNOTATIONS CURRENT THROUGH April 8, 2011 ***

Florida Rules of Juvenile Procedure
Part I. Delinquency Proceedings
Part F. HEARINGS

***Fla. R. Juv. P. 8.100* (2011)**

Review Court Orders which may amend this Rule

Rule 8.100. General Provisions for Hearings

Unless otherwise provided, the following provisions apply to all hearings:

(a) *Presence of the Child.* --The child shall be present unless the court finds that the child's mental or physical condition is such that a court appearance is not in the child's best interests.

(b) *Use of Restraints on the Child.* --Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, may not be used on a child during a court proceeding and must be removed prior to the child's appearance before the court unless the court finds both that:

(1) The use of restraints is necessary due to one of the following factors:

(A) Instruments of restraint are necessary to prevent physical harm to the child or another person;

(B) The child has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior; or

(C) There is a founded belief that the child presents a substantial risk of flight from the courtroom; and

(2) There are no less restrictive alternatives to restraints that will prevent flight or physical harm to the child or another person, including, but not limited to, the presence of court personnel, law enforcement officers, or bailiffs.

(c) *Absence of the Child.* --If the child is present at the beginning of a hearing and during the progress of the hearing voluntarily absents himself or herself from the presence of the court without

leave of the court, or is removed from the presence of the court because of disruptive conduct during the hearing, the hearing shall not be postponed or delayed, but shall proceed in all respects as if the child were present in court at all times.

(d) *Invoking the Rule.* --Prior to the examination of any witness the court may, and on the request of any party in an adjudicatory hearing shall, exclude all other witnesses. The court may cause witnesses to be kept separate and to be prevented from communicating with each other until all are examined.

(e) *Continuances.* --The court may grant a continuance before or during a hearing for good cause shown by any party.

(f) *Record of Testimony.* --A record of the testimony in all hearings shall be made by an official court reporter, a court approved stenographer, or a recording device. The records shall be preserved for 5 years from the date of the hearing. Official records of testimony shall be provided only on request of a party or a party's attorney or on a court order.

(g) *Notice.* --Where these rules do not require a specific notice, all parties will be given reasonable notice of any hearing.

HISTORY: *Amended eff. Jan. 1, 1981 (393 So.2d 1077); Jan. 1, 1985 (462 So.2d 399);* amended and renumbered eff. *July 1, 1991 (589 So.2d 818)* (formerly Rule 8.220); amended eff. *Jan. 26, 1995 (649 So.2d 1370); Apr. 29, 1999 (753 So.2d 541); June 26, 2008 (2008 Fla. Lexis 1109, 33 Fla. L. Weekly S 424); Jan. 1, 2010 (2009 Fla. LEXIS 2066)*

NOTES:

The 1977 revision of the Florida Rules of Juvenile Procedure was adopted effective January 1, 1977, *see 345 So.2d 655;* this compilation includes amendments through October 15, 2010.

THE COMMONWEALTH OF MASSACHUSETTS
ADMINISTRATIVE OFFICE OF THE JUVENILE COURT
Three Center Plaza
Seventh Floor
Boston, Massachusetts 02108

Tel: 617-788-6550
Fax: 617-788-8965

MICHAEL F. EDGERTON
Chief Justice

JANE STRICKLAND
Court Administrator

MEMORANDUM

To: First Justices
Associate Justices
Clerk-Magistrates
Chief Probation Officers

From: Michael F. Edgerton, Chief Justice

Date: February 25, 2010

Re: Restraints in Juvenile Court

Please be advised that effective Monday, March 1, 2010, the Court Officers Policy and Procedure Manual of the Trial Court of the Commonwealth will be amended to implement a new procedure relative to the use of restraints on juveniles in the courtroom. The policy and procedure creates a presumption that restraints will be removed from juveniles while appearing in a courtroom before a justice of the Juvenile Court, unless there is an order and specific finding by a Juvenile Court justice that restraints are necessary because there is reason to believe that the juvenile may try to escape, or that the juvenile may pose a threat to his or her own safety, or to the safety of other people in the courtroom, or if it is reasonably necessary to maintain order in the courtroom.

The amendment is attached with commentary on the new policy. Paragraph 5 of the new policy sets forth several factors that a Juvenile Court justice must consider prior to issuance of any order and finding. Court officers have been informed today that it is their responsibility to report any security concerns with any juvenile to the justice presiding in the courtroom, however, the decision to use restraints in each individual case is the sole determination of the Juvenile Court justice presiding in the courtroom at the time that the juvenile appears before the court.

cc: Hon. Robert A. Mulligan
Chief Justice for Administration and Management
Thomas J. Connolly, Director of Security
Administrative Office of the Trial Court

AMENDMENT TO
TRIAL COURT OF THE COMMONWEALTH
COURT OFFICER POLICY AND PROCEDURES MANUAL

The Trial Court of the Commonwealth Court Officer Policy and Procedures Manual, Chapter 4, Courtroom Procedures, Section VI, Juvenile Court Sessions is hereby amended by inserting the following:

Use of Restraints in the Juvenile Court Department

1. **Purpose.** The purpose of this subsection is to provide procedures and guidelines and promote uniformity in practice when using restraints on juveniles that appear before the Juvenile Court.

2. **Applicability.** This subsection is applicable to all Divisions of the Juvenile Court and to all proceedings within the jurisdiction of the Juvenile Court, and to any and all stages of those proceedings.

3. **Definitions.** *Juveniles* - Persons appearing before the Juvenile Court under the age of seventeen in delinquency and children in need of services cases, under the age of eighteen in care and protection cases and under the age of twenty-one in youthful offender cases; *Restraints* - Devices that limit voluntary physical movement of an individual. The only instruments of restraint approved by the Security Department are handcuffs and leg irons, also known as shackles (See chapter 11).

4. **Presumption Against Use of Restraints.** There is a presumption that restraints shall be removed from juveniles while appearing in a courtroom before a justice of the Juvenile Court.

5. **Use of Restraints on Juveniles Appearing Before the Juvenile Court.** Restraints may not be used on juveniles during court proceedings and must be removed prior to the appearance of juveniles before the court at any stage of any proceeding, unless the justice presiding in the courtroom issues an order and makes specific findings on the record that restraints are necessary because there is reason to believe that a juvenile may try to escape, or that a juvenile may pose a threat to his or her own safety, or to the safety of other people in the courtroom, or restraints are reasonably necessary to maintain order in the courtroom. The justice presiding in the courtroom shall consider one or more of the following factors prior to issuance of any order and findings: (a) the seriousness of the present charge (supporting a concern that the juvenile had an incentive to attempt to escape); (b) the criminal history of the juvenile; (c) any past disruptive courtroom behavior by the juvenile; (d) any past behavior that the juvenile presented a threat to his or her own safety, or the safety of other people; (e) any present behavior that the juvenile represents a current threat to his or her own safety, or the safety of other people in the courtroom; (f) any past escapes, or attempted escapes; (g) risk of flight from the

courtroom; (h) any threats of harm to others, or threats to cause a disturbance, and (i) the security situation in the courtroom and courthouse, including risk of gang violence, or attempted revenge by others.

It shall be the responsibility of the court officer charged with custody of a juvenile to report any security concerns with said juvenile to the justice presiding in the courtroom. The justice presiding in the courtroom may attach significance to the report and recommendation of the court officer charged with custody of the juvenile, but shall not cede responsibility for determining the use of restraints in the courtroom to the court officer. The justice presiding in the courtroom may receive information from the court officer charged with custody of the juvenile, a probation officer, or any source which the court determines in its discretion to be credible on the issue of courtroom or courthouse security.

The decision to use restraints shall be the sole determination of the Juvenile Court justice who is presiding in the courtroom at the time that a juvenile appears before the court. No Juvenile Court justice shall impose a blanket policy to maintain restraints on all juveniles, or a specific category of juveniles, who appear before the court.

COMMENTARY

This amendment to the Trial Court of the Commonwealth Court Officer Policy and Procedures Manual prohibits the use of restraints on juveniles in the courtroom without an order and specific finding by a Juvenile Court justice that restraints are necessary because there is reason to believe that the juvenile may try to escape, or that the juvenile may pose a threat to his or her own safety, or to the safety of other people in the courtroom, or if it is reasonably necessary to maintain order in the courtroom. In some cases, the Juvenile Court justice, with information from the court officer charged with custody of the juvenile and defense counsel, will be able to decide in advance whether restraints are necessary during the appearance of a juvenile. In those cases, the justice is still be required to issue an order and make specific findings on the record that restraints are necessary.

The Supreme Court of Illinois stated over thirty years ago that "shackling . . . of the accused should be avoided if possible because: (1) it tends to prejudice the jury against the accused; (2) it restricts his ability to assist his counsel during trial; and (3) it offends the dignity of the judicial process." *People v. Boose*, 66 Ill. 2d 261, 265-266 (1977). "The possibility of prejudicing a jury, however, is not the only reason why courts should not allow the shackling of an accused in the absence of a strong necessity for doing so. The presumption of innocence is central to our administration of criminal justice. In the absence of exceptional circumstances, an accused has the right to stand trial 'with the appearance, dignity, and self-respect of a free and innocent man.'" *In re Derwin Stanley*, 67 Ill. 2d 33, 37 (1977). Massachusetts cases are in accord as it relates to trial of an adult defendant in a criminal case before a jury. See *Commonwealth v. Brown*, 364 Mass. 471, 475 (1973).

Shackling of juveniles in courtroom proceedings is antithetical to the Juvenile Court goals of rehabilitation and treatment. California, Connecticut, Florida, New Mexico, New York, North Dakota, North Carolina and Vermont do not shackle juveniles as a result of State Supreme Court decisions that have ruled against blanket shackling orders for juveniles, or statutes that prohibit unnecessary restraints. See *Tiffany A. v. The Superior Court of Los Angeles County*, 150 Cal. App. 4th 1344, 1362 (2007)(juvenile court could not use shackles on minors "absent an individualized determination of need").

The United States Supreme Court has not addressed the issue of whether juveniles have the right to appear in court without shackles. The Florida Supreme Court in approving an amendment to the Florida Rules of Juvenile Procedure on December 17, 2009, found that the blanket practice of shackling young defendants was "repugnant, degrading, humiliating, and contrary to the stated primary purpose of the juvenile justice system . . . ." The court further stated that "[w]e recognize, without deciding, that indiscriminate use of restraints on children in the courtroom in juvenile delinquency proceedings may violate the children's due process rights and infringe on their right to counsel. We agree . . . that the presumption should be that children are not restrained when appearing in court and that restraints may be used only upon an individualized determination that such restraints are necessary."

INTRODUCTION

The Supreme Court of Pennsylvania has adopted new Rule 139 with this Recommendation. This new rule is effective June 1, 2011.

EXPLANATORY REPORT
APRIL 2011

The purpose of this rule is to eliminate shackling during a court proceeding in almost every case. Only in the few extreme cases should such restraints be utilized.

The Committee considered this issue in light of the Report from the Interbranch Commission on Juvenile Justice (ICJJ). In the ICJJ Report, the Commission asked the Juvenile Justice Delinquency Prevention Committee of the Pennsylvania Commission on Crime and Delinquency to perform a study to reduce and if possible eliminate shackling in Pennsylvania's juvenile courtrooms.[1]

The Committee believes it is appropriate to address the use of restraints in the courtroom and to limit the use of such restraints by Rule of Court, especially in those cases where the juvenile does not pose a risk. The Committee wants to ensure that the routine use of excessive restraints is discouraged because it is contrary to philosophy of balanced and restorative justice and undermines the goals of providing treatment, supervision, and rehabilitation to juveniles. However, there are some circumstances when juveniles should be restrained to protect themselves and others and to maintain security in the courtroom.

Pursuant to paragraphs (1) through (3), restraints may be used if it is determined that they are necessary to prevent: 1) physical harm to the juvenile or another person; 2) disruptive courtroom behavior; or 3) the juvenile from fleeing. In all three circumstances, there should be evidence that the juvenile has a history of such behavior or there are other factors present that make the juvenile very likely to pose a risk.

The Committee believes that the juvenile should be given an opportunity to comment prior to the use of restraints and that the court should make its findings on the record if restraints are utilized.

---

[1] Interbranch Commission on Juvenile Justice, *Report*, May 2010, at page 54.

It is also important to note that this rule only affects the use of restraints in court proceedings. Sheriffs, probation officers, and other persons providing transportation of juveniles to and from detention facilities, placement facilities, and other locations may be governed by internal procedures and policies, including insurance policies, to use restraints during the transportation of juveniles. The use of restraints in those situations is governed by local policies of operation.

PA S. Ct. Rule → leads to legislation

Rule 139. Use of Restraints on the Juvenile

Restraints shall be removed prior to the commencement of a proceeding unless the court determines on the record, after providing the juvenile an opportunity to be heard, that they are necessary to prevent:

1) physical harm to the juvenile or another person;

2) disruptive courtroom behavior, evidenced by a history of behavior that created potentially harmful situations or presented substantial risk of physical harm; or

3) the juvenile, evidenced by an escape history or other relevant factors, from fleeing the courtroom.

COMMENT

The use of any restraints, such as handcuffs, chains, shackles, irons, or straitjackets, is highly discouraged. The routine use of restraints on juveniles is a practice contrary to the philosophy of balanced and restorative justice and undermines the goals of providing treatment, supervision, and rehabilitation to juveniles. Therefore, restraints should not be used in most instances. However, there are some circumstances when juveniles need to be restrained to protect themselves and others and to maintain security in the courtroom. *See* 42 Pa.C.S. § 6301 for purposes of the Juvenile Act.

Official Note: Rule 139 adopted April 26, 2011, effective June 1, 2011.

Committee Explanatory Reports:

Final Report explaining the provisions of Rule 139 published with the Court's Order at 41 Pa.B. - (-).

§ 6336.2. Use of restraints on children during court proceedings.

(a) Use of restraints.--Except as provided for in subsection (b), restraints such as handcuffs, chains, shackles, irons or straitjackets shall be removed prior to the commencement of a court proceeding.

(b) Exception.--Restraints may be used during a court proceeding if the court determines on the record, after providing the child with an opportunity to be heard, that they are necessary:

(1) to prevent physical harm to the child or another person;

(2) to prevent disruptive courtroom behavior, evidenced by a history of behavior that created potentially harmful situations or presented substantial risk of physical harm; or

(3) to prevent the child, evidenced by an escape history or other relevant factors, from fleeing the courtroom.

(May 29, 2012, P.L.570, No.56, eff. 60 days)

2012 Amendment. Act 56 added section 6336.2.

MEMORANDUM OF AGREEMENT

This Memorandum memorializes an agreement between the Delaware Family Court, the Department of Services for Children, Youth and Their Families, and the Office of the Public Defender. The Memorandum will be piloted in New Castle County with implementation in Kent and Sussex counties to follow upon review of the pilot program.

Effective 11/4/13, handcuffs and belly chains shall be removed from a juvenile detainee prior to the commencement of any civil or delinquency proceeding unless the Court, upon request by a representative from the Division of Youth Rehabilitation Services (DYRS), determines on the record that restraints are necessary and no less restrictive alternative is available. Counsel for the juvenile, or the juvenile if he/she is pro se, shall have an opportunity to be heard. The Court may also, sua sponte, order that the juvenile remain restrained during proceedings.

When the Court orders that a juvenile remain restrained, the Court shall make a finding as to the existence of at least one of the following factors to justify the continued use of restraints, and also find that no less restrictive alternative is available:

1. The juvenile is presently uncontrollable and constitutes a serious and evident danger to him/ or herself or others;

2. There are safety risks for the youth or staff in the court room, including but not limited to the presence of known gang associates, or other individuals including relatives, who could pose a risk to youth and staff;

3. Written documentation of the youth's history of non-compliance with law enforcement, court security, and DYRS staff, including but not limited to evidence of prior attempts to escape custody or other relevant factors; or

4. Written documentation of the youth's behavior at the detention facility.

As part of this agreement, the Family Court will prepare a form of order to document the reason(s) listed above if the handcuffs and belly chains are to remain on a juvenile. This order will become part of the court file and all such orders shall be sent by Family Court staff to the Director of Operations in each county who will submit a monthly report to the Chief Judge and the Court Administrator.

This Memorandum and the data reported to the Chief Judge and Court Administrator will be reviewed by the participating agencies annually.

EXTRA: Court order for youth shackles

Sun News Report Las Cruces Sun-News
Posted:
lcsun-news.com

Filed Sept. 19, 2007

STATE OF NEW MEXICO

COUNTY OF DONA ANA

THIRD JUDICIAL DISTRICT COURT

In the Matter of the Use

of Physical Restraints on

Respondent Childen

No. CS-2007-01

Judge Robles

TEMPORARY EMERGENCY ORDER ESTABLISHING PROCEDURES FOR THE USE OF PHYSICAL RESTRAINTS

This matter comes before the Court upon its own motion. IT IS HEREBY ORDERED:

1. Children in the custody of the Doña Ana County Juvenile Detention Center shall not be brought into the Courtroom wearing handcuffs, leg irons, waist chains, or any other physical restraint devices except as ordered in advance by the Court based upon an individualized determination of need.

2. The State may file a written ex parte application with the assigned Judge to have the Child restrained during the hearing. The application must be in the form attached hereto, must be sworn, and must contain specific factual allegations sufficient to establish reasonable grounds to believe that the Child, if not restrained, will pose a particular threat to the safety of himself or others in the Courtroom, would be likely to attempt escape, or would present some other security risk.

3. The burden is upon the State to demonstrate the need for physical restraints. Neither the child's status in custody, lack of courtroom security, nor inadequacy of Court facilities are sufficient in and of themselves to establish the need.

4. The State will file its application no later than 24 hours prior to the Child's scheduled hearing. The State may file the application later but only upon a showing of good cause.

5. The assigned Judge will approve, disapprove, or approve with modifications the application on the face of the document. Unless disapproved, the application bearing the Judge's approval will be delivered promptly to the Detention Center and a copy will be delivered to the Child's attorney.

6. If the Child is restrained, the Child's attorney may ask the Court to order the Child's restraints removed at the beginning of the hearing. If there is sufficient time before the hearing, the Court may schedule a separate hearing, at which the Child need not be present, to hear the Child's response to the State's application.

7. A Court order permitting the use of restraints will remain in effect at subsequent hearings, other than trial, unless the Court orders otherwise.

8. This order will take effect on October 1, 2007 and will remain in effect pending further order of this Court.

Signed

Robert E. Robles

Chief District Judge

Lisa C. Schultz

District Judge Division V

Fernando R. Macias

District Judge, Div. VIII

THE CIRCUIT COURT OF THE STATE OF OREGON
TWENTY-FIFTH JUDICIAL DISTRICT
YAMHILL COUNTY

JOHN L. COLLINS
PRESIDING JUDGE

Yamhill County Courthouse
McMinnville, Oregon 97128
Phone (503) 434-7497
FAX (503) 435-3067

February 7, 2011

Mr. Rick Sanai
Acting Deputy District Attorney
County Counsel
535 NE Fifth Street
McMinnville, OR 97128

Ms. Paula Lawrence
Attorney at Law
235 NE. 3rd Street, No. 1
McMinnville, OR 97128

LETTER SENT BY EMAIL ONLY. NO HARD COPY MAILED.

Re: [Names omitted in this copy]

Counsel:

This matter came before the court on motion for release of youths detained in the Yamhill County Juvenile Detention Center, YCJDC. At the writing of this letter opinion, the youths are not in custody, but the court is proceeding with a ruling in this matter because it raises issues that are likely to re-occur with other youth in detention. Moreover, the issue presented is one of ongoing and important public policy and should be addressed regardless of the present circumstances of the particular youths in this case. *See, e.g., United States v. Howard,* 463 F.3rd 999 (9th Cir. 2006).

The initial motion to release cites ORS 169.770, 169.740 and the Due Process Clause, 14th Amendment to United States Constitution and the Oregon Constitution. The initial motion specifically asserts that YCJDC is in violation of those provisions in the first three practices set forth below. The youths' supplemental motion to release asserts the fourth listed basis:

1. Handcuffing and shackling youth before, during and after in-person court appearances and handcuffing youth before during and after video court appearances.
2. Restricting possession of usual and necessary defense counsel materials during attorney-client visits thereby interfering with the youth's meaningful access to counsel and constituting an illegal administrative search.
3. Unreasonably restricting a youth's access to their legal papers.
4. Strip searching youths following court appearances and at other times without individualized reasonable suspicion.

In further support of youths' position on the fourth issue, the supplementary motion cites restrictions on YCJDC strip searches arising from federal litigation and, specifically, the opinion of United States District Court Judge Michael Mosman in which Judge Mosman ruled, "... it is unconstitutional to strip search juveniles after contact visits and without individualized suspicion that the juvenile has acquired contraband." The youths, here, seek to extend this restriction to strip searches conducted after in-custody court appearances.

I. Shacking of In-Custody Youth Offenders.

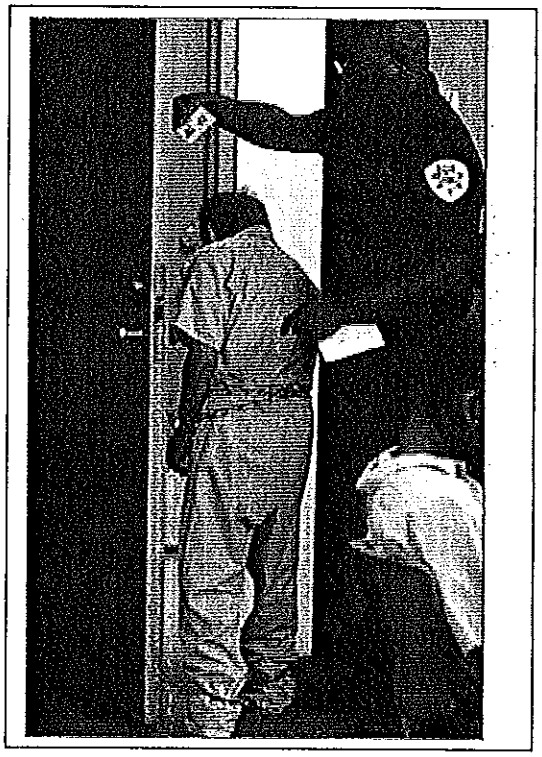
The practice present in this case has been commonly referred to as "shackling." Analysis of this issue requires some discussion of how the practice works.

Youth, in the same manner as in-custody adult offenders, prior to being escorted to court, are placed in leg cuffs connected by a chain, sometimes referred to as leg irons. A chain, commonly referred to as a "belly chain" is placed around the youth's waist. Standard police handcuffs are placed on the youth's wrists and those cuffs are looped through a short link to the center of the waist chain. This has the effect of keeping the youth's hands closely connected to the center of the youth's waist.

Youth are not always placed in leg irons, but are consistently placed in belly chain and hand cuffs. Sometimes youth are brought into the courtroom from OYA custody or on transport from another location, as opposed to brought into the courtroom directly from the detention facility connected to the courthouse. Outside transports are most often fully shackled, including leg irons.

Youths in this restraint are escorted by a juvenile court counselor, detention staff member, Oregon Youth Authority officer or, sometimes, a court security officer, to court and remain in that restraint while in court, including when the youth is at counsel table in his or her specific hearing. The youth continues to be shackled as he or she is escorted back to the detention center.

While not a perfect depiction, youths are restrained similarly to the youth in this photograph from a USA Today article submitted to the court.



An attorney may ask the court to direct that the youth be unshackled while at counsel table participating in the hearing. It is generally recognized that this is within the discretion of the judge and will generally be granted, absent presentation to the court of information that would lead the court to conclude that the youth may be a danger to him or herself or others in the courtroom, or is a risk to attempt to escape. Attorneys rarely ask that the client be unshackled, but may do so more often if the appearance is for an evidentiary hearing or trial.

In this particular case, the court, on its own initiative, after inquiring whether there were any indications that the youth might be a risk of harm or flight, directed that the handcuffs be removed while the youth were participating in the proceeding.

The YCJDC is a part of the courthouse-jail-sheriff's office structure. Internal secure passage exists between the detention center to a door that opens onto the second floor of the courthouse. The second floor hallway is open to the public and is where the four courtrooms are located. This is the same door through which adult defendants are brought from the jail, though, for legal and other reasons, they are not intermingled.

Youths are most often taken to courtroom 4, the door to which is located about 30 feet from the detention/jail secure door. This is the same door through which the public enters. The aisle to the front row of seats where the youth will be seated until called, or to the counsel table for his/her case, is through public seating and the same aisle used by the public, attorneys, court staff and the judge.

If proceedings are in the next courtroom down the hall, courtroom 1, detained youth will enter through a non-public side door about 20 feet further down the hall. The hallway with entry to courtrooms 1 and 4 can be closed off to the public on a temporary basis. Once in through the non-public side door, the youths are escorted to seating separated from public access but in the same area as attorneys and court staff.

Access to courtrooms 3 and 2, in that order, require that the shackled youth be escorted down the open public hallway to the courtroom. The detained youth are brought in through the public entrance. The path to counsel table or seating is not as constricted as courtroom 4, but is close to public as well as attorneys and court staff.[1]

The issue of shackling of juveniles has prompted much debate across the state and across the country. Since the 1995 Oregon Court of Appeals decision to be discussed hereinafter, Multnomah County has not shackled juveniles in court. Jackson County has recently implemented a no shackling policy after the issue was raised by the Jackson County Criminal Defense consortium. No court decision was issued, but an agreement was reached. The practice, however, across the state, appears to vary from county to county and from courtroom to courtroom and even from case to case. Some practices appear to depend, at least in part, on whether the courtrooms are configured to provide secure separate access from detention and the extent of available security staff.

According to a report provided to the court in this case, since 2007 shackling without an individualized analysis of risk has been banned in California, Connecticut, Florida, New Mexico, New York, North Dakota, North Carolina and Vermont.[2] These bans are attributed to State Supreme Court decisions that have ruled against blanket shackling for juveniles, rule changes, or statutes that prohibit unnecessary restraints. Some of the states have created a "presumption against shackling" absent an individualized determination of need.

The report also points out that "shackling of juveniles in courtroom proceedings is antithetical to the juvenile court goal of rehabilitation and treatment." Psychological and medical experts have rendered opinions in pleadings and evidentiary hearings in jurisdictions where this issue has been litigated. They opine that children suffer emotionally, psychologically and medically when held in restraints similar to those used in this county.[3]

---

1 The Yamhill County situation, thankfully, does not involve transport of the juvenile by vehicle or across an open area such as the courtyard. Certainly where the youth is transported by vehicle other safety and security considerations apply.

2 *See, e.g., Tiffany A. v. Superior Court,* 150 Cal App 4th 1344 (2007), where the California appellate court held that the juvenile court could not use physical restraints upon all minors who appeared in court *absent an individualized determination of need.*

3 The report identifies one such expert as Dr. Marty Beyer. The expert who testified in this case, Dr. Morrell, adopted much of Dr. Beyer's opinions in presenting his own by affidavit and by telephonic testimony in this proceeding. At the hearing, this court sustained the state's objection that the Beyer memo was hearsay. Upon further reflection, I believe this ruling was in error since the Beyer memo was specifically referred to and adopted by Dr. Morrell as a part of his expert testimony. I have considered the Beyer memo, though most of the information is also referred to in the Alaska report which was submitted to the court without objection. The Alaska report quotes Dr. Beyer as opining that "being shackled in public is humiliating for young people, whose sense of identity is vulnerable. The young person who feels he/she is being treated like a dangerous animal will think less of him/herself. Children and adolescents are more vulnerable to lasting harm from feeling humiliation and shame than adults." The report goes on to state that Dr. Beyer "argues that indiscriminate and routine shackling of children in court, before family and strangers, is damaging to the juvenile's fragile sense of identity. She notes that the practice could undermine a juvenile's willingness to trust adults in positions of authority, could damage the juvenile's moral identity and development, and could undermine the rehabilitative goals of court intervention. As an expert in the

The Florida Supreme Court, on December 17, 2009, adopted its Juvenile Court Rules Committee's proposed rule regarding the indiscriminate use of shackling. The Florida Supreme Court, as quoted in the Alaska report referenced below, made this finding: "We find the indiscriminate shackling of children in Florida courtrooms as described in the NJDC's Assessment repugnant, degrading, humiliating and contrary to the stated purposes of the juvenile justice system and to the principals of therapeutic justice..." It went on to rule: "We agree with the proponents of this amendment that the presumption should be that children are not restrained when appearing in court and that restraints may be used only upon an individualized determination that such restraint is necessary."

Effective March 1, 2010, routine shackling of juveniles in Massachusetts was eliminated under a Juvenile Court Chief Justice's policy directive. Steps to limit shackling of juveniles have been taken in several other states and in several other courts and counties within Oregon. According to Dr. Morrell, a seasoned clinical psychology consultant to the Oregon Youth Authority Rogue Valley Youth Correctional Facility, shackling is "no longer the model for the Oregon Youth Authority, among many correctional institutions."

The debate goes on in a wide variety of forums. Those who seek to continue the practice of shackling juveniles argue that it is necessary for public safety, safety of others in the courtroom and the safety of the specific juvenile and to prevent escape. Proponents also argue that shackling has a deterrent effect both on the youth in question and on other juveniles that might contemplate delinquent conduct. Proponents see shackling as a way to re-enforce the importance of the proceeding.[4]

Opponents of shackling of youth argue that shackling is demeaning, shaming and contrary to the rehabilitative mission of the juvenile court. Many, supported by expert testimony and studies, take the position that shackling can be particularly harmful to children who have been victims of physical or other abuse as is common among persons later involved in delinquent behavior.

No matter the scope and merit of the broader debate, the Oregon Court of Appeals has clearly held that shackling of youth in court proceedings is a violation of that youth's constitutional right to due process and fair trial. In *State ex rel Juvenile Department of Multnomah County v. Millican,* 138 Or App 142 (1995), the Court of appeals stated:

> Oregon has long recognized the rights of adult defendants to be free from physical restraints during criminal trials. *State v. Smith*, 11 Or 205 (1883). That right, which derives from the common law, as well as from the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, protects the accused from "self-incrimination by mute testimony of a violent disposition." *State v. Moore*, 45 Or App 837 (1980). Although most often invoked as a safeguard against potential jury prejudice, the right to stand trial unshackled also insures that defendants may face the court "with the appearance, dignity and self-respect of a free an innocent person" *State v. Kessler*, 57 Or App (1982) quoting *People v. Harrington*, 42 Cal. 165 (1871). As we stated in *Kessler*:

---

interplay between adolescent development, trauma, and disability, she expresses particular concern about the traumatic impact of shackling juveniles who have been previously traumatized by physical and sexual abuse, loss, neglect, and abandonment; she further notes that shackling exacerbates trauma, reviving feelings of powerlessness, betrayal, self-blame and could trigger flashbacks and reinforce early feelings of powerlessness."

4 On the last two points, this court has no testimony or other evidence, reports or evidence-based studies that would support these theories.

"[T]he inferences the jury may draw is just one of the elements of prejudice to a defendant who is shackled. The shackles impinge on the presumption of innocence and the dignity of the judicial proceedings and may inhibit consultation with his attorney and his decision whether to take the stand as a witness." 57 Or App at 474.

The right not to be shackled is not, however, absolute. A trial judge has "the discretion to order the shackling of a defendant if there is evidence of an immediate and serious risk of dangerous or disruptive behavior. *State v. Moore*, 45 Or App at 839-40. In exercising that discretion, the court must receive and evaluate relevant information and must make a record allowing appellate review of its decision. *Kessler*, 57 Or App at 473. Although the information need not be presented in a formal adversary proceeding, "a conclusory statement alone by a prosecutor or law enforcement officer is not sufficient to permit the independent analysis necessary for the exercise of discretion." *State v. Schroeder*, 62 Or App (1983).

***

Although some of the concerns underlying Kessler *et al* do not apply in this context because there is no right to a jury in juvenile court proceedings, *State ex rel Juv. Dept. v. Reynolds,* 317 OR 560, 574 (1993), two factors warrant our extension of the right against physical restraint to juvenile proceedings. First, the right to remain unshackled is based on considerations beyond the potential for jury prejudice, including inhibition of free consultation with counsel. ... That concern applies equally in the juvenile context.

Second, extending the right to remain unshackled during juvenile proceedings is consonant with the rehabilitative purposes of Oregon's juvenile justice system. See generally *Reynolds,* 317 Or at 574. Allowing a young person who poses no security hazard to appear before the court unshackled, with the dignity of a free and innocent person, may foster respect for the judicial process. See also *In re Staley*, 67 Ill.2d 33 (1977) (extending to juveniles the right to remain unshackled in non-jury proceedings absent a showing that the accused posed a threat of escape)

The court, again citing *Kessler,* identified three potential types of prejudice from shackling: (1) impingement on the presumption of innocence and the dignity of judicial proceedings; (2) inhibition of the accused's decision whether to take the stand as a witness; and (3) inhibition of the accused's consultation with his or her attorney.

The court found the court's denial of the youth's request to be unshackled to be harmless error in the particular circumstances and record of that case. "Harmless error" does not mean that the youth was not harmed by the shackling. It means that the error did not warrant overturning the jurisdictional decision of the trial court in the face of substantial incriminating evidence presented in the case.

Notably then Judge DeMuniz, now Supreme Court Chief Justice DeMuniz, dissented and would have not found the error harmless and would have reversed the decision and remanded it for a new trial. A reading of that dissent is worthwhile. Judge DeMuniz points out that the court should also consider "the potentially prejudicial effect on the child's ability to testify, because shackling is likely to be more psychologically jarring for children than adults. Wearing leg irons may seriously undermine a child's confidence in telling his side of the story, which would adversely affect the credibility determinations of even the most experienced juvenile judge." *Millican,* at 149.

Further, Judge DeMuniz notes,

> Since 1907, the focus of this state's juvenile proceedings has been on "rehabilitation" of delinquents and not on "crime control." *State ex rel Juv Dept v. Reynolds*, 317 Or 560, 567 (1993). The purpose of a delinquency hearing is not to punish or convict, but rather to salvage, guide, and protect delinquent youths as wards of the court. *Id,*. at 568. The role of a juvenile judge is fundamentally different from that of a judge in an adult criminal prosecution. The ultimate question in juvenile court is not guilt or innocence, but rather 'what kind of care, custody, and control will best meet the needs of the child." *State v. Stewart,* 123 Or App 147, 155 (1993).
>
> Leaving child in leg irons without finding that he is dangerous disruptive or prone to escape is so far removed from the "best interest of the child" that prejudice is presumed."
>
> I am aware that the recently passed Juvenile Justice Task Force Bill (SB1)[5] replaces the "best interest of the child" standard with the stated purpose of protecting the public, reducing juvenile delinquency and providing fair and impartial procedures for dealing with delinquent conduct.... Even if SB 1 effectively overrules *Reynolds* and makes delinquency hearings more akin to criminal prosecution, that is all the more reason not to deny juveniles the protections afforded adult defendants.

In *Millican,* the youth was before the court for a trial. One could argue that *Millican* was not intended to apply to court appearances less at the core of due process. In other words, it could be argued that a youth need not be unshackled at an arraignment, detention release or review hearing, plea or even disposition (sentencing). At such an appearance, the youth is not faced with the decision whether to testify, giving testimony, communicating with his/her attorney during questioning of witnesses by the prosecution or the youth's own attorney – activities more central to a jurisdictional hearing or trial. I suspect this distinction may be the reason why so many courts in Oregon have continued to allow shackling, except at trial and absent individualized reason, at non-evidentiary or non-testimonial hearings.

Nonetheless, most of the harms or potential harms of shackling identified not only in *Millican* but also in the literature, studies and other information discussed, in part, herein, exist in all types of court appearances. The exception is impact on the youth's decision to testify and in giving testimony as would be the case at a trial or allocution at a dispositional hearing.

Essentially, then, the principal harms exist at all types of appearances by the youth.

The statutory basis for the youth's claims in this case is ORS 169.770. That statute provides:

> "... [T]he juvenile court ... shall, upon motion of any party or on its own motion, and after prompt hearing, release any juvenile detained in a facility which violates ... ORS 169.740 or 169.750, unless the court finds that such violation is not likely to reoccur."
>
> ORS 169.750 provides:
> "A juvenile detention facility may not ... (2) Use any physical force, other means of physical control or isolation on a detained juvenile except as reasonably necessary and justified to prevent escape from the facility, physical injury to another person, to protect a detained juvenile from physical self-injury or

5 SB1, to which the opinion refers, is the present Oregon law.

to prevent destruction of property ... and for only so long as it appears that the danger exists. A use of force or other physical means of control may not employ

(a) The use of restraining devices for a purpose other than to prevent physical injury or escape, or in any case, for a period in excess of six hours. However, the time during which a detained juvenile is being transported to another facility pursuant to court order shall not be counted within the six hours; ...."

Arguably, ORS 169.730, *et sec* applies only when the youth is in the facility itself. However, when being transported to another facility or to the courtroom the youth is still in the constructive custody of the detention center. Provisions in ORS 169,750(2)(a), implicitly at least, recognizes this by providing that limits on the duration of physical restraint do not apply while the youth, pursuant to court order, is being transported to another facility, thus outside of the facility itself.

Thus, both under the *Millican* decision and the above statute make it clear that a youth may only remain shackled in court where it is reasonably necessary and justified to prevent escape, physical injury to the youth or another person, prevent destruction of property or escape. If restraint is authorized, it must only last for as long as is necessary to meet the danger and must be based on specific information that the specific youth presents a danger to himself or others or predisposition to attempt to escape. The decision must be made by the judge presiding over the case on an individual basis.[6]

The motion in this case raises more than the issue of shackling during court proceedings. The question of shackling while being brought to court and being returned to detention presents some more complex considerations. The youth must pass through areas open to the public and even pass directly among members of the public, attorneys, court staff, witnesses and sometimes the victim of the conduct. This is especially true in courtroom 4, a small courtroom with no direct separate access to the front of the courtroom. During busy court days, no matter to or from which courtroom the juvenile is being taken, there is no access without passing through a public hallway and in close proximity to the public, attorneys and court staff and sometimes witnesses including, possibly, the victim. That same passage to the courtrooms involves potential escape routes down the first set of stairs, the hallway or, beyond courtrooms 4 and 1, the stairway to the front of the courthouse.

The types of prejudice from shackling identified in *Millican,* quoting *Kessler*, -- impingement on the presumption of innocence, inhibition of the accused's decision whether to take the stand and inhibition of the accused's consultation with his or her attorney – are minimally, if at all, implicated during transport to and from court.

The court has a duty to protect the rights of the accused, but the court also has a duty to guard the safety, security and dignity of court proceedings. The duty of safety to the public, attorneys and court staff extends to the hallways of the courthouse, entry into the courtrooms, and along passage to the counsel table. Members of the public have also a Constitutional right to public access, including the courtroom hallways and the courtroom aisles

---

6 The Massachusetts policy suggests the following factors: The judge presiding in the case shall consider one or more of the following factors prior to issuance of any order or findings: (a) the seriousness of the present charge (supporting a concern that the juvenile has an incentive to attempt to escape); (b) the criminal history of the juvenile;(c) any past disruptive courtroom behavior by the juvenile; (d) any past behavior that the juvenile presented a threat to his or her own safety, or the safety of other people; (e) any present behavior that the juvenile presents a current threat to his or her own safety, or the safety of other people in the courtroom; (f) any past escapes, or attempted escapes; (g) risk of flight from the courtroom; (h) any threats of harm to others, or threats to cause a disturbance, and (i) the security situation in the courtroom and courthouse, including risk of gang violence, or attempted revenge by others. The last provision of the amendment states: "... No Juvenile court justice shall impose a blanket policy to maintain restraints on all juveniles, or a specific category of juveniles, who appear before the court."

leading to the youth's position at counsel table when his or her case is called. In conduct that involves a victim, that victim has a right to be present during critical stages of a case and would not uncommonly be in the hallway outside the courtroom or in the general public area of the courtroom along the way.

The greatest potential harm to the youth that might occur by shackling in transport to and from the courtroom is the potential psychological harm identified in debate across the country and, specifically in this case by Dr. Morrell and Dr. Beyer (as adopted by Dr. Morrell). This potential harm is not insubstantial, especially, as noted, with youths that have experienced abuse in their upbringing – sadly, not an uncommon factor, particularly with troubled youth prone to enter the juvenile delinquency system and meet standards to be placed in or remain in custody in detention facilities.

The harm or potential harm is not absolute with every youth. It has been presented in this case through expert testimony, not direct evidence or evidence-based studies. This is of *some* significance in the weight the court gives to the potential harm, especially where the harm is less implicated in transport to and from the courtroom.

This court spent some time at the beginning of this section of the opinion describing shackling. It is the same restraint used with the most hardened and dangerous adult offenders and the same used in prisons and "chain gangs". It is this type of restraint – shackles – that is the focus of the expert testimony regarding significant harm to juveniles.

The potential for harm must be weighed, then, against the public safety considerations and risk of escape along open public hallways and during courtroom egress to counsel table where the youth will officially stand before the court and the *Kessler/Millican* harms are also implicated.

Of consideration, too, is the fact that juveniles, by nature, can be impulsive. It is this very impulsivity that leads law and society to provide greater protection of juveniles against harm others may impose on them or they may inflict on themselves or others. Common sense dictates that if an impulsive act of harm to self or others, or flight, is to occur, it is most likely to occur during the transport from detention to appearance before the court.

Counsel for the state in this case appropriately points out that not all youth charged with an act that would be a crime if the youth were an adult are held in detention for commission of a delinquent act.[7] Detention of youth accused of a delinquent act is not axiomatic. There are statutory restrictions on detention of youth that tend by their nature to detain persons who are at least alleged to have posed some harm or risk of flight. ORS 419C.145 provides as follows (emphasis added):

> **419C.145 Preadjudication detention; grounds.** (1) A youth may be held or placed in detention before adjudication on the merits *if one or more of the following circumstances exists*:
> (a) The youth is a fugitive from another jurisdiction;
> (b) The youth is alleged to be within the jurisdiction of the court under ORS 419C.005, by having committed or attempted to commit an offense which, if committed by an adult, would be chargeable as:
> (A) A crime involving infliction of physical injury to another person;
> (B) A misdemeanor under ORS 166.023 [Disorderly conduct in the first degree]; or
> (C) Any felony crime;

7 More technically, as applied here, "an act that if done by an adult would constitution a violation of the law." ORS 419C.005.

(c) The youth has willfully failed to appear at one or more juvenile court proceedings by having disobeyed a proper summons, citation or subpoena;

(d) The youth is currently on probation imposed as a consequence of the youth previously having been found to be within the jurisdiction of the court under ORS 419C.005, and there is probable cause to believe the youth has violated one or more of the conditions of that probation;

(e) The youth is subject to conditions of release pending or following adjudication of a petition alleging that the youth is within the jurisdiction of the court pursuant to ORS 419C.005 and there is probable cause to believe the youth has violated a condition of release;

(f) The youth is alleged to be in possession of a firearm in violation of ORS 166.250; or

(g)The youth is required to be held or placed in detention for the reasonable protection of the victim.

(2) A youth detained under subsection (1) of this section must be released to the custody of a parent or other responsible person, released upon the youth's own recognizance or placed in shelter care unless the court or its authorized representative makes written findings that there is probable cause to believe that the youth may be detained under subsection (1) of this section, that describe why it is in the best interests of the youth to be placed in detention *and that one or more of the following circumstances are present*:

(a) No means less restrictive of the youth's liberty gives reasonable assurance that the youth will attend the adjudicative hearing; or

(b) The youth's behavior endangers the physical welfare of the youth, the victim or another person, or endangers the community.

(3) When a youth is ordered held or placed in detention, the court or its authorized representative shall state in writing the basis for its detention decision and a finding describing why it is in the best interests of the youth to be placed in detention. The youth shall have the opportunity to rebut evidence received by the court and to present evidence at the hearing.

(4) In determining whether release is appropriate under subsection (2) of this section, the court or its authorized representative shall consider the following:

(a) The nature and extent of the youth's family relationships and the youth's relationships with other responsible adults in the community;

(b) The youth's previous record of referrals to juvenile court and recent demonstrable conduct;

(c) The youth's past and present residence;

(d) The youth's education status and school attendance record;

(e) The youth's past and present employment;

(f) The youth's previous record regarding appearance in court;

(g) The nature of the charges against the youth and any mitigating or aggravating factors;

(h) The youth's mental health;

(i) The reasonable protection of the victim; and

(j) Any other facts relevant to the likelihood of the youth's appearance in court or likelihood that the youth will comply with the law and other conditions of release.

(5) Notwithstanding subsection (2) of this section, the court may not release a youth when:

(a) There is probable cause to believe the youth committed an offense that, if committed by an adult, would constitute a violent felony; and

(b) There is clear and convincing evidence that the youth poses a danger of serious physical injury to or sexual victimization of the victim or members of the public while the youth is on release.

Thus, the effect of this statute is that no youth will be held in detention unless:

1. There is probable cause (facts) to believe the youth committed a serious offense: a felony or a misdemeanor involving infliction of physical injury (or disorderly conduct), or has failed to appear in court, or has allegedly violated probation or violated pre-trial release, possessed a firearm or is a danger to the victim.
2. The court determines that detaining the youth in a detention facility is in the youth's best interest, and
3. Considering factors listed in subsection 4, there is no means less restrictive of the youth's liberty that will give reasonable assurance that the youth will attend the adjudicative hearing; or
4. The youth's behavior endangers the physical welfare of the youth, the victim or another person, or endangers the community.

Stated otherwise, there is some risk of harm, albeit based on the present allegation, or risk of non-appearance or flight. With this in mind, it is appropriate that some degree of restraint be imposed in transporting the youth to and from court provided, however, that the method of restraint used does not result in harm that outweighs the need for the restraint.

In this weighing process applicable to transport to and from the courtroom and up to counsel table, the court must consider what alternatives to full-scale shackling might be used that would mitigate the potential harm to the juvenile while protecting the safety of the public and protecting against risk of escape.[8] The following methods come to mind, but is by no means an exhaustive list:

- Less oppressive restraints. Use of the same full-scale shackles, chains, leg irons, belly chains and handcuffs used with hard-core dangerous adults imposes harm to the juvenile beyond what would appear to be needed to guard against an impulsive attempt to escape or harm someone. It is these "shackles" that impose the potential harm and are not needed except in that unusual case where information specific to the specific youth would justify that level of restraint. This court has urged juvenile officials to look into less oppressive restraints and no leg restraints. I have been made aware options are available or can be created.
- Where there is some indication of flight risk, use of a leg brace, as is used with adult offenders, that will slow movement without the visibility and implications of leg irons and other "full shackling".
- Greater use of video court appearance. This system was only fairly recently established for juveniles even though it has been in place for a long time with adults. With an exception noted later in this opinion, it appears to work well. With hearings that require direct consultation with counsel this method may not be practical, though counsel appearing from detention *with* the juvenile by video may also be an alternative.
- Request for courtroom or hallway adaptation. In some cases, public access and exposure of the youth in restraint (presumably less oppressive restraints) to the hallway to courtrooms 4 and/or 1 could temporarily be limited and/or contain the youth behind the locked hallway door just south of the entry to courtroom 1.
- More assistance from courthouse security. It is recognized that we are in a period of limited funding resources for security personnel and predictions are that funding will only continue to be a tougher issue in years to come. Nonetheless, escort of an unshackled or limitedly restrained youth by a security officer may provide greater security than might be available when escorted by a juvenile counselor.[9] This could require an adjustment in scheduling to not bring juveniles to court during other high demand on security personnel.

---

8 This approach is also consistent with the "least restrictive means" concept. Under that concept, even if there is a compelling governmental interest that might justify restriction on a constitutional or statutory right, it is to be implemented in a manner that least restricts the right. *See, e.g., State v. Wolfe*, 273 Or 518 (1975).

9 It may be that limitations on funding and limitations resulting from courthouse structure or available security personnel will not be a defense to a requirement of unshackling juveniles. *See, e.g., In re Tiffany A.*, 150 Cal.App 4th 1344 (Cal.Ct. App.2007).

The motion also raises objection to youth being handcuffed and/or fully shackled while before the video camera for video court appearance. I understand this practice has stopped. If not, it is not justified and must be stopped, absent an individualized showing of necessity and prior court approval. This is based on the same considerations that prohibit shackling or unreasonable restraint of a youth brought to court – *i.e.,* it is in violation of statute and the youth's rights to do so unless there is a judicial finding that the youth presents a danger to him or herself or staff within the detention facility.[10]

Summary of ruling regarding shackling:

1. Youth are not to be shackled in the matter presently practiced, while at counsel table participating in his or her case unless the court, in advance of the appearance in court at counsel table, has made a finding that the youth presents a danger to him/herself or others or a risk of attempt to escape. Criteria for this decision will be like those set forth in footnote 6.
2. Youth brought before the video camera for video appearance in court must not be shackled or otherwise physically restrained unless the court, prior to appearance, has approved reasonable restraint based on risk of self-harm, harm to others or damage to property. That decision must be based on facts specific to the particular youth. Again, see footnote 6.
3. Youth being transported to and from court proceedings, and while in court awaiting their case, may be reasonably restrained. However, the juvenile department is to submit a plan for restraint that does not involve the practice of full scale shackling. Full shackling can be used only with prior judicial approval based on a showing that it is necessary due to risk of harm to self or others or risk of attempted escape that is particular to the specific youth and that lesser restraint is insufficient.

II. ***Restrictions on possession of usual and necessary defense counsel materials during attorney-client visits thereby interfering with the youth's meaningful access to counsel and constituting an illegal administrative search.***

There can be no debate that a youth in detention is entitled to access to counsel. This is both a Constitutional right and a statutory right juvenile detention facilities are required to honor. See ORS169.740(2)(d). Implicit in that right is the requirement that any rules restricting access be limited and reasonable.

This issue was previously raised before this court. The court, in May, 2010, found certain of YCJDC's policies and procedures imposed unjustified impediments to an appropriate level of access to counsel. Those concerns, for the most part, were addressed by YCJDC. Provisions now exist for either a non-contact visit in a room adapted for that purpose, or a contact visit with the juvenile in a secure room. Reasonable restrictions on what attorneys can bring to contact visits were defined and posted and attorneys should be able to know what can and cannot be brought beyond the storage lockers. The YCJDC policy referring to a potentially intrusive "inventory" of attorney paperwork has been addressed. Identity of expert witnesses is now protected. Attorneys are allowed quicker access if known to detention staff or presenting a bar card identification.

Nonetheless, counsel now asserts that the intent, if not the letter, of the court's prior ruling is not being followed in all ways.

---

10 Consideration of risk of flight is not, obviously, a factor when the youth remains in the detention facility. Risk of damage to property, however, *could* be a consideration leading to restraint within the facility, but would require prior approval and be justified by facts specific to the youth. If the concern is for potential damage to video or other equipment, that can be addressed by protecting the equipment rather than shackling the juvenile.

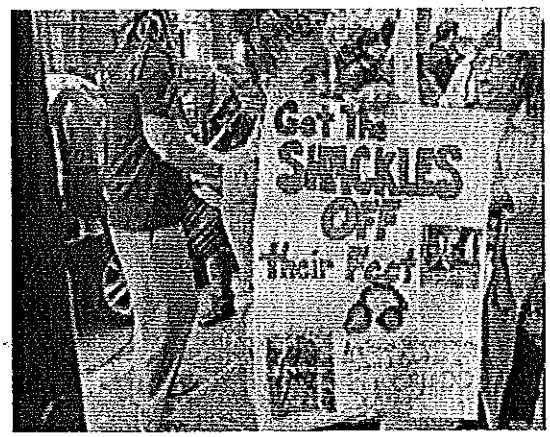
The Cincinnati HERALD®

AWARD-WINNING NEWSPAPER A SESH COMMUNICATIONS PUBLICATION

Issues 1-13

2013-04-27 / Front Page

Routine shackling no longer allowed in juvenile judge's courtroom



Supporters of Juvenile Court Judge Tracie Hunter move to enforce her no shackling order for most

When juvenile defendants appear in Judge Tracie M. Hunter's courtroom, for the first time in over 20 years, they will no longer be shackled. Judge Hunter implemented the policy April 9, while away, to give Juvenile Court time to prepare for the first hearing upon her return from judicial conferences. She immediately enforced her no shackling order.

Pursuant to the no shackling order, a juvenile shall no longer appear in court in shackles in any proceeding in front of Judge Hunter, unless it is shown that the juvenile is a danger to him/ herself, a danger to the public or at risk to attempt escape. The state, sheriff or

juveniles appearing in her courtroom rallied at Hamilton County Courthouse last week. Photos by Michael Mitchell provided

any impacted party may motion the court to shackle for good cause shown on a case-by-case basis, and if, after a hearing, based on the evidence, the court determines it is the best interest of the child to be shackled, the judge will take the necessary precautions.

Hunter said she believes that the blanket policy of shackling juveniles is not in the best interest of children and contrary to evidence-based best practices. After initially rolling out the no shackling policy in her courtroom only, Hunter said she plans to eventually ban shackling during all courtroom proceedings under her jurisdiction in Juvenile Court, once it is safely implemented.

Supporters of Juvenile Court Judge Tracie Hunter move to enforce her no shackling order for most juveniles appearing in her courtroom rallied at Hamilton County Courthouse last week. Photos by Michael Mitchell provided

"The routine shackling of juveniles, regardless of the type of offense and regardless of whether they present a danger or threat of harm, negates the presumption that they are innocent before being adjudicated delinquent, and is not in the best interest of all children, according to the latest research" says Hunter.

Juveniles in Hamilton County routinely appear in court in leg shackles, handcuffs and a belly belt or stomach chains, regardless of how minor or severe the alleged offense, when detained.

Hunter said she believes that the court must differentiate between those cases where juveniles are charged with violent offenses versus non-violent offenses; and identify those children who are more likely to attempt to escape versus those with no escape history.

Hamilton County Juvenile Court, like many juvenile courts across Ohio have received low marks, compared to more progressive states, when evaluated on implementing best practices in regard to shackling juveniles. Hunter believes said it is time for the local Juvenile Court to take the lead on initiating reform that is in the best interest of children based on available research and best practices.

States such as Florida, Pennsylvania, and Illinois have already banned or reformed the policy of shackling juveniles during courtroom proceedings. Hunter plans to eliminate routine shackling, but employ a multi-pronged test after a hearing conducted by herself or a magistrate, and to shackle only as needed, when safety or escape is a demonstrated

concern.

Hunter says the uniform practice should be dismantled for the health, safety and emotional welfare of all children. She adds she is committed to the safety of the entire Juvenile Court.

Hunter met with Sheriff Jim Neil and all of Juvenile Court's security team before issuing her no shackling order. "I understand that change is difficult and sometimes slow, but I believe best practices require implementing new policies when the best interest of juveniles is at stake.

Return to top

Share / Save

Copyright 2010-2013 The Cincinnati Herald, All Rights Reserved

Our Hometown

Newspaper web site content management software and services

DMCA Notice